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IN THE

Supreme Court of the United States

RAYMOND ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), requires the dismissal of actions against separate corporate entities for tortious commercial conduct where such entities, including the non-sovereign defendant in this case, had no immunity from suit in United States courts before the enactment of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11?

2. Whether a separate commercial entity, with no prior expectation of immunity and which gained immunity only by being defined as an "instrumentality" under the FSIA, can now use that newly conferred immunity to shield its pre-enactment conduct from redress in United States courts?

3. Whether the application of a statute to extinguish a plaintiff's pre-existing cause of action may have an impermissible retroactive effect under *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), or whether only a defendant's expectations should be considered?

PARTIES TO THE PROCEEDING

Petitioners-Plaintiffs Raymonde Abrams, Nicole B. Silberkleit, Janet Herman, Lily Redner, Bernard Caron, Ernest Haar, Harry Cybulski, Yvonne Litman, Cassandra Kirby Conahay Freund, Jean Jacques Fraenkel, Liliane Lichtenstein, and Marie Weinrauch are individual persons.

Respondent-Defendant Société Nationale des Chemins de Fer Francais is a separate corporation formed under the laws of the Republic of France.

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Petitioners-Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit ("Second Circuit").

OPINION BELOW

The opinion of the Second Circuit (Appendix to Petition ("Pet. App.") at 1a) is reported at 389 F.3d 61.

STATEMENT OF JURISDICTION

The judgment of the Second Circuit was entered on November 9, 2004. No petition for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C §§ 1330, 1602-11, are set out at Pet. App. at 31a.

STATEMENT OF THE CASE

This suit is brought on behalf of survivors deported during World War II from France to Nazi death camps on the trains of the defendant commercial corporation, Société Nationale des Chemins de Fer Français ("SNCF").[1] Relying on this Court's decisions in *Republic of Austria v. Altmann,* 541 U.S. 677, 124 S. Ct. 2240 (2004), and *Dole Food Co. v. Patrickson,* 538 U.S. 468 (2003), the United States Court of Appeals for the Second Circuit dismissed this case. Plaintiffs believe the Second Circuit's reasoning and analysis conflict with this Court's reasoning and holding in *Altmann.* Plaintiffs seek this Court's review of the Second Circuit's determination that retroactive application of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, to create immunity for SNCF's conduct during World War II is mandated by this Court's decisions in *Altmann* and *Dole.*

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[1]The United States District Court for the Eastern District of New York has jurisdiction over the claims at issue here pursuant to 28 U.S.C. §§ 1331, 1350 and 1367. *See* Pet. App. at 15a.

This case raises fundamental issues that are not addressed by *Altmann* or *Dole,* issues involving the creation of immunity for commercial corporations like SNCF and the role of settled expectations of plaintiffs in a retroactivity analysis.

Altmann does not hold that the FSIA requires immunity to be given to a separate commercial corporation that never enjoyed immunity before the FSIA. While now defined as an "instrumentality of a foreign state,"[2] prior to 1976, SNCF had always been amenable to suit in United States courts. It never had any expectation of immunity, and the government of France never expected that SNCF would be granted immunity as a gesture of comity.[3]

Altmann did not reject an analysis of the rights of injured plaintiffs, as the Second Circuit summarily did in this case. Instead, this Court found that analysis of the rights of the sovereign defendants was all that was necessary given the facts presented in *Altmann.*

Nor did *Dole* require immunity to be granted where none previously existed. At issue in *Dole* was the procedural question as to whether federal or state courts had jurisdiction over the suit, and not, as in this case, using immunity to foreclose all redress.[4] Questions of retroactivity were not relevant in that case since the acts at issue all occurred years after the enactment of the FSIA.

Neither *Altmann* nor *Dole,* nor the retroactivity analysis approved in *Landgraf v. USI Film Products,* 511 U.S. 244 (1994), creates immunity for entities like SNCF. In the context of this case against a separate corporate entity, with no right to sovereign immunity prior to 1976, and for which no sovereign has claimed any such immunity, *Altmann*'s logic

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[2]28 U.S.C. §§ 1603 (a) and (b)(2).

[3]France itself has never afforded immunity to SNCF, which has always been considered a private corporation and subject to suit under French law.

[4]Other issues in *Dole*, such as the question of a tiered subsidiary or percentage of ownership by a sovereign, are not relevant to this case.

and reasoning do not warrant dismissal as the Second Circuit found. *Landgraf* was not overruled by *Altmann* in every FSIA case as the Second Circuit holds. Under the reasoning of *Altmann*, *Landgraf* still provides the framework for determining retroactivity in cases involving settled expectations, where private rights are affected and where neither plaintiff nor defendant is a sovereign state.

For these reasons, as discussed more fully below, the Second Circuit's holding conflicts with *Altmann* and the petition for a writ of certiorari should be granted.

I. SNCF's Corporate Status and Actions.

This is not a lawsuit against a government. France is not a party to this lawsuit and has not appeared. This is a lawsuit against a separate legal entity whose shares are currently owned by a government and is based on its commercial, profit-making activities. *See* Pet. App. at 8a-9a.

SNCF is and was a separate corporation. Prior to the passage of the FSIA in 1976, SNCF was frequently sued in United States courts for wrongs related to its transportation business and appeared without claiming immunity. As a consequence of the FSIA, however, SNCF was thereafter generally rendered immune for its post-1976 conduct as an "instrumentality" of France because of the French government's ownership of shares of SNCF.

SNCF sent its first train of Jews and other "undesirables" to Auschwitz on March 27, 1942, and sent its last train on August 17, 1944. It operated 72 such convoys deporting more than 76,000 Jews; fewer than three percent survived. Included among SNCF's deportées to the death camps were 168 American, Canadian and British pilots shot down over France. SNCF scheduled the deportation trains as ordinary commercial transactions, and SNCF personnel operating the trains were ordinary employees acting in the ordinary course of business. They ran the trains and, after each trip, cleaned and disinfected the cars. The organization and operation of the deportation trains were simply a matter of routine, and SNCF was totally responsible for its acts and decisions. SNCF selected the trains, which were mostly cat-

tle cars; the "conditions inside the deportation trains were inhumane and frequently fatal." Pet. App. at 9a. The deportation trains were clearly marked, and their destinations – death camps like Dachau and Auschwitz – well known.

During World War II, SNCF "preserved its independence by collaborating with the German authorities and by accommodating their transportation needs." Pet. App. at 9a. SNCF implemented, and was paid for, the death camp deportations as a private entrepreneur under civilian control. SNCF charged per head, per kilometer, for the "services."

The fee for each of the "passengers" on the deportation trains was equivalent to the standard commercial fares for train tickets purchased by ordinary travelers, and was billed by SNCF to the Nazis quarterly in the ordinary course of business. After the liberation of Paris, SNCF had at least one unpaid bill for these trains, which it sent to the DeGaulle government for payment. The bill was duly paid.

The conduct of SNCF constitutes a violation of the law of nations, including aiding and abetting in the commission of war crimes and violations of the Nuremberg Principles. *See* Pet. App. at 8a.

II. Procedural History.

In September 2000, plaintiffs, primarily American survivors of the trains or their heirs, filed suit in the United States District Court for the Eastern District of New York, seeking to hold SNCF accountable for its actions in knowingly deporting people to Nazi concentration camps for money.

SNCF moved to dismiss Plaintiffs' complaint, claiming that it was entitled to sovereign immunity pursuant to the FSIA. Plaintiffs opposed SNCF's motion, arguing that the question of immunity should be resolved based on the law in effect at the time of the alleged acts; that SNCF, as a separate corporate entity, would have had no immunity at that time; and that therefore, applying the FSIA would be impermissibly retroactive. Plaintiffs also cross-moved for discovery, arguing that whether SNCF was entitled to immu-

nity could not be resolved based on the existing record. *See* Pet. App. at 10a.

In November 2001, the District Court granted SNCF's motion to dismiss, concluding that 28 U.S.C. § 1330 of the FSIA was the sole source of the Court's subject matter jurisdiction over Plaintiffs' claims and that none of the exceptions to foreign sovereign immunity set forth in the FSIA applied to this case. Pet. App. at 3a, 10a. The District Court also denied Plaintiffs' cross-motion for discovery. Pet. App. at 10a.

In June 2003, the United States Court of Appeals for the Second Circuit reversed and remanded in a unanimous decision, holding that the District Court had failed to do the analysis mandated by this Court in *Landgraf*, to determine if the application of the FSIA to the case at bar was impermissibly retroactive.[5] Pet. App. at 19a-23a. The Second Circuit held that application of the FSIA to grant immunity today to SNCF, if it had no such immunity prior to the enactment of the FSIA, would be impermissibly retroactive. However, because the existing record was insufficient for any such determination, discovery was required. Pet. App. at 29a-30a. The Second Circuit was thus unable to decide if the FSIA could be applied retroactively to this case, and instructed the District Court to develop the record as to whether the Plaintiffs could have had their claims adjudicated in the courts of the United States. *See* Pet. App. at 29a-30a. Discovery conducted thereafter clearly indicated that SNCF had no such immunity prior to the enactment of the FSIA.

In August 2003, SNCF petitioned this Court for a writ of certiorari. Plaintiffs opposed the petition. In June 2004, this case was remanded to the Second Circuit for reconsideration in light of *Altmann*. On remand, the Second Circuit dismissed this case on November 9, 2004, holding that the

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[5]Under *Landgraf*, a court, in evaluating the retroactivity of a statute, must determine if there is any clear Congressional intent as to its retroactivity, and if not, whether a retrospective application of the statute in question would impair rights or create liability that did not previously exist. *See Landgraf*, 511 U.S. at 280.

retroactivity analysis established in *Landgraf* was "inappropriate" and that the court was "bound by the Supreme Court's decision to defer to comity." Pet. App. at 4a, 6a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision is inconsistent with the decision and the careful reasoning of this Court in *Altmann*. The conclusion in *Altmann* was that the retroactivity analysis set forth in *Landgraf* did not control that case where the expectations of the sovereign were the focus of the analysis. *Altmann* did not overrule *Landgraf* in all cases, nor in all cases involving an entity claiming sovereign immunity. *Altmann* did not address the situation presented to the Second Circuit, where private rights and expectations, not those of a sovereign, were threatened by retroactive application of a statute which could not pass the *Landgraf* test for such retroactive reach.

The Second Circuit incorrectly interpreted *Altmann* and *Dole* to require the retroactive application of the FSIA to cases involving separate commercial corporations, as well as to those involving sovereigns. However, this Court did not address in *Altmann* or *Dole* any issue as to the retroactive application of the FSIA to claims against a separate corporate entity for its pre-FSIA conduct for which that entity had been amenable to suit as a matter of substantive law. Thus, the reasoning of this Court in *Altmann* does not lead to the broad conclusions that the Second Circuit adopted.

The Second Circuit rejected in this case any analysis of the settled expectations of plaintiffs; this position conflicts with the Third and Ninth Circuits, which do consider such expectations in a retroactivity analysis. This issue is not considered by this Court in *Altmann* at all. *Altmann* is consistent with the conclusion that the FSIA should not be applied retroactively to erase legitimate rights and expectations of private plaintiffs and immunize from justice the wrongful actions of entities that had no immunity and no expectation of immunity. Nothing in *Altmann* requires otherwise.

I, Permitting This Suit to Continue Against SNCF Is Consistent with *Altmann*'s Holding.

A. The *Landgraf* Analysis Set Forth in *Altmann*.

The Second Circuit rejected the retroactivity analysis of *Landgraf* in all cases involving the retroactive reach of the FSIA, holding that, after *Altmann*, "reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles." Pet. App at 5a. However, this Court in *Altmann* did *not* find that *Landgraf* could never apply in cases where claims of sovereign immunity are at issue. Had such a broad holding been intended, this Court need not have addressed *Landgraf* at all. Unless this Court's analysis of *Landgraf* in *Altmann* was merely an academic exercise, the Second Circuit is wrong in its conclusions that no *Landgraf* reliance interests remain to be considered after the FSIA.

Clearly recognizing the continued importance and vitality of *Landgraf* in protecting legitimate prior substantive rights from retroactive application of law unless Congress expressed specific intent to extinguish those rights, this Court began its reasoning in *Altmann* with an historical analysis of sovereign immunity to explain why the default rule in *Landgraf* did not control the outcome in *Altmann*.

As an initial matter, this Court found that sovereign immunity was neither constant substantively nor consistently applied. The application of the principles espoused in *Landgraf* were not determinative because the scope of immunity granted to the sovereign was not a matter of settled expectations based on steady application of law. Instead, the scope of the sovereign state's immunity was solely a matter of grace and comity, which could, and did, change, based on extra-legal considerations, such as foreign policy concerns.

Therefore, an analysis framed in terms of settled rights did not provide a clear answer in *Altmann*, because the flexible principles of comity granted to a foreign sovereign reflect "current political realities and relationships." *Altmann*, 124 S. Ct. at 2252 (citing *Dole*, 538 U.S. at 479). Those principles are by their nature fluid and changing, and therefore, unsettled.

Under *Landgraf,* a court must determine whether a statute would "impair rights a party possessed when the party acted, increase a party's liability for past conduct, or impose new duties." *Landgraf,* 511 U.S. at 280. If so, then the statute should not be retroactively applied. According to this Court's opinion in *Altmann*, none of these three examples of retroactivity was dispositive. Foreign governments[6] enjoyed no settled expectation in avoiding suit in a particular forum through a defense of sovereign immunity, and foreign states had no right to immunity as a matter of law, only a justifiable expectation that as a matter of comity, United States courts would grant them immunity for their public acts. *Altmann*, 124 S. Ct. at 2251-52. Thus, the *Landgraf* default rule did not definitively resolve that case. *Id.*

The Second Circuit's blanket rejection of *Landgraf* failed to take into account such reasoning. This Court went beyond the analysis mandated by *Landgraf* because such an analysis alone was not dispositive of sovereign immunity issues where defendant was a sovereign government. However, had the Second Circuit followed the same approach used by this Court in *Altmann*, it would have determined that such an analysis of the rights and expectations of the parties in this case did, in fact, provide a clear answer.

As a separate commercial entity, SNCF had no expectation of sovereign immunity for any conduct prior to 1976. SNCF itself was repeatedly sued in United States courts before enactment of the FSIA.[7] SNCF went to great, and cre-

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[6]The defendants in *Altmann* were the Republic of Austria and the Austrian Gallery (national museum), which was not a separate corporation. *See* n.11 *infra.*

[7]SNCF was sued at least seven times in United States courts between 1942 and 1975. *See Wheeler v. Société Nationale des Chemins de Fer Français,* 108 F. Supp. 652 (S.D.N.Y.1952); *Kaufman v. Société Nationale des Chemins de Fer Français,* Civil Action No. 92-130 (S.D.N.Y. Mar. 30, 1954); *Shulman v. Compagnie Generale Transatlantique,* 152 F. Supp. 833 (S.D.N.Y. 1957); *Dunajevski v. Société Nationale des Chemins de Fer Français,* 35 N.Y.S.2d 102 (City Ct. N.Y. County 1942); *Abatangelo v. Société Nationale des Chemins de*

(continued...)

ative, lengths in searching for reasons to avoid these suits.[8] In none of those cases, however, did SNCF assert, suggest or, as discovery of SNCF has shown, even consider a defense of sovereign immunity in any suit against it. In fact, SNCF has confirmed to Plaintiffs that it has no internal documents of any nature even mentioning sovereign immunity in the United States.

This lack of immunity for SNCF is consistent with at least 150 years of American jurisprudence. A corporation, even one owned by a sovereign, has always been amenable to suit when engaging in commercial activity. *E.g.*, William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 543-46 (1991). This rule of law was consistently applied from at least 1824. *Bank of the United States v. Planters Bank of Georgia*, 22 U.S. (9 Wheat) 904, 907 (1824). *See also Molina v. Comision Reguladora del Mercado de Henequen*, 103 A. 397 (N.J. 1918); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929); *Coale v. Société Co-operative Suisses des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921); *Ulen & Co. v. Bank Gospodarstwa Krajowego*, 24 N.Y.S.2d 201, 206 (App. Div. 1940); *The Beaton Park*, 65 F. Supp. 211, 213 (W.D. Wash. 1946); *In re Aircrash Disaster Near Roselawn*, 909 F. Supp. 1083, 1108-1100 (N.D. Ill. 1995). In *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 250 n.12 (1949), this Court specifically referred to the *Deutsches Kalisyndikat* and *Coale* cases as examples of the "difference between the liabilities of foreign public or semipublic corporations and

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[7](...continued)
Fer Français, Civil Action No. 88-391 (S.D.N.Y. 1953); *Siegmeier v. Société National des Chemins de Fer Français*, 1 A.D.2d 879, 150 N.Y.S.2d 775 (1st Dep't 1956); *Fuss v. French National Railroads*, 35 Misc. 2d 680, 231 N.Y.S.2d 57 (Sup. Ct. N.Y. County), *aff'd*, 17 A.D.2d 941, 233 N.Y.S.2d 1013 (1st Dep't 1962).

[8]For example, in *Fuss v. French National Railroads*, 35 Misc. 2d at 681-84, 231 N.Y.S.2d at 58-62, SNCF's lead counsel, Murray Gurfein, argued lack of subject matter jurisdiction based on the commerce clause.

those of the foreign government to which they are related."

B. Rights of Plaintiffs Must be Considered

This Court has not found that only the rights of defendants are to be considered in determining the retroactive application of law and has not rejected the approach of the Third Circuit or the Ninth Circuit, which do, in fact, review and consider the expectations of injured plaintiffs. *See Mathews v. Kidder Peabody & Co.*, 161 F.3d 156, 170-71 (3d Cir. 1998); *Scott v. Boos*, 215 F.3d 940, 944-47 (9th Cir. 2000). Thus, the Second Circuit is in error when it held that both *Altmann* and *Dole* required that it must reject "the perspective of the injured plaintiffs." Pet. App. at 6a.

Plaintiffs' expectations were clear. Prior to the FSIA, plaintiffs would have had a right, based on law, not grace or comity, to sue SNCF for its crimes against humanity committed during World War II. The presumption against retroactivity holds where a statute would impermissibly deprive plaintiffs of a cause of action as to which they had an antecedent right and expectation. *See Mathews*, 161 F.3d at 170-71; *Scott*, 215 F.3d at 944-47. "[D]epriving plaintiffs of a claim . . . also constitutes a retroactive effect." *Mathews* 161 F.3d at 166. Where a law destroys a jurisdictional basis previously available to Plaintiffs, such a change "'speaks not just to the power of a particular court but to the substantive rights of the parties as well.'" *Id.* (quoting *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 951 (1997)).

Despite this, the Second Circuit held that, because of this Court's decision in *Altmann*, it was forced to reject approaching "the situation from the perspective of the injured plaintiffs whose rights have now been altered." Pet. App. at 6a. Yet *Altmann* neither rejected nor even reviewed the rights of plaintiffs.

This Court found only that the expectations of foreign sovereigns were shaped by comity, which by its nature is changing and political. The unsettled nature of the defendant's expectations were sufficient for this Court to determine that an analysis framed in terms of *Landgraf* would not provide any answer. The historical expectations of the defen-

dant in this case are different. SNCF, as a separate entity, would not have been afforded any gesture of comity. Its expectations were always that it was amenable to suit in United States courts.

II. The Second Circuit Misapplied Principles of "Grace and Comity."

Failing to undertake the historical analysis used by this Court in *Altmann*,[9] and finding instead that it was bound by this Court's deference to comity, the Second Circuit assumed that SNCF, as an "instrumentality" under the FSIA, was entitled to the same principles of grace and comity as a sovereign. However, such reasoning is circular; it assumes retroactivity to determine retroactivity. The Second Circuit categorized SNCF as an instrumentality under the FSIA and thus entitled to comity. Because of that, any application of the FSIA to grant immunity would not be impermissibly retroactive based on the reasoning in *Altmann*. However, it is only in applying the FSIA retroactively that SNCF would be considered an instrumentality.[10] Prior to the enactment of the FSIA and at the time of the alleged acts, SNCF had no expectation of comity and no right to immunity. Indeed, nothing in the FSIA itself, or in *Altmann* or *Dole*, suggests that separate entities re-categorized as "instrumentalities of foreign states" were thereby entitled to the same comity as actual sovereign governments.

Comity is the recognition and respect that one nation affords to another nation's processes and procedures. *See Hilton v. Guyot*, 159 U.S 113, 163-64 (1895). In the classic statement of the doctrine, this Court defined comity as "'the recognition which one nation allows within its territory to the *legislative*, *executive* or *judicial* acts of another nation.'" *Société Nationale Industrielle Aerospatiale v. United States*

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[9]Such historical analysis is not the same as relying upon the State Department's past determinations, which the Second Circuit also rejected, and which plaintiffs agree is neither called for nor warranted in this case.

[10]"Instrumentality" is a term defined in the FSIA. *See* 28 U.S.C. § 1603(b)(2). Before the enactment of the FSIA, there were no foreign state "instrumentalities."

Dist. Court, 482 U.S. 522, 544 n.29 (1987) (quoting *Hilton*, 159 U.S. at 163-64) (emphasis added). *See also Restatement (Third) of the Foreign Relations Law of the United States* § 101e (1987). It is "the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states." *Société Nationale Industrielle Aerospatiale*, 482 U.S. at 543 n.27. "Comity of nations" is the recognition afforded to another nation's jurisdiction to prescribe laws. *See Hartford Fire Ins. Co v. California*, 509 U.S. 764, 798, 816 (1993).

SNCF is a commercial corporation. It enacts no laws and issues no regulations. The French government is not seeking to address any wrongs committed by SNCF, and the government of France has not appeared in this proceeding.

Moreover, this Court confirmed in *Altmann* that "*Landgraf*'s retroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context." *Altmann*, 124 S. Ct. at 2252 (citing *Landgraf*). In *Altmann*, defendants were a sovereign government and the Austrian Gallery, which was not a separate corporate entity.[11]

The plaintiffs here are individuals who were on the trains themselves, or the heirs of such individuals. They are clearly not asserting sovereign interests. Nor is SNCF. The defendant is a commercial corporation which ran the deportation trains for profit and today earns millions of dollars in the United States from the retail sale of train tickets. And indeed, SNCF's own settled expectations, as proved by its consistent failure to claim immunity when repeatedly sued in United States courts, show that both it and France, which never sought a suggestion of immunity from the State Department, considered SNCF's rights to be essentially private.

Neither the facts of *Altmann* nor the opinion treats at all the settled expectations or amenability to suit of separate corporate entities engaged in commercial activities, which were

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[11] Unlike SNCF, the Austrian Gallery (a national museum of the Republic of Austria) is not a corporation and issues no stock. *See* Brief for Petitioners at ii, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004) (No. 03-13).

never based on principles of comity, but rather on more than 150 years of jurisprudence that separate entities were always amenable to suit. No deference to comity in this case is appropriate, and the Second Circuit's reliance on such principles is in error.

III. *Dole Food Co v. Patrickson*, 538 U.S. 468 (2003), Is Not Dispositive of This Case.

In dismissing this case, the Second Circuit also mistakenly relied on *Dole*. This Court's references to *Dole* in *Altmann* do not warrant the dismissal of this case on sovereign immunity grounds. The facts and holding of *Dole*, which raise no issue as to retroactivity, are not analogous to the issues in this case, and provide no guidance in resolving these issues. *Dole* dealt neither with the substantive reach of immunity nor the retroactivity of a statute, and the Second Circuit was wrong in holding that *Dole* requires that a separate corporate entity be given immunity for commercial conduct that predates the enactment of the FSIA.

In fact, no question of substantive law was presented to this Court in *Dole*, and no party's substantive rights were in jeopardy. *Dole* dealt solely with post-FSIA conduct and the issue of when "instrumentality" status under the FSIA should be determined. Under 28 U.S.C. § 1330 of the FSIA, federal courts are granted jurisdiction over "instrumentalities." Preferring federal jurisdiction, the defendants in *Dole* sought a determination as to when instrumentality status should be determined in seeking removal from state court. Indeed, this Court in *Dole* did not mention *Landgraf* at all. Therefore, *Dole* concerned the purely procedural question of whether or not that case could be removed from state court to federal court in a suit based on post-FSIA conduct.

Moreover, *Dole* did not consider whether retroactive application of the FSIA would improperly impair existing rights and settled interests under *Landgraf*. No question was raised of completely depriving plaintiffs of substantive rights and plaintiffs' right to assert claims in United States courts was never in jeopardy. The only effect of this Court's ruling in *Dole* was to require that the suit proceed in state court, as opposed to federal court.

IV. The Reasoning of *Altmann*, Which Requires Retroactive Application of the FSIA to a Sovereign Government, Does Not Justify Retroactive Immunization of a Separate Corporation Like SNCF

Altmann and *Dole* enhance the level of comity between the United States and the governments of other countries, because, consistent with the two principal purposes of the FSIA, they help to "clarify[] the rules that judges should apply in resolving sovereign immunity claims and eliminat[e] political participation in the resolution of such claims." *Altmann*, 124 S. Ct. at 2253. Thus, *Altmann* and *Dole* interpret the FSIA as offering clarity to sovereign governments regarding, respectively, their own (post-1976) potential exposure to U.S. federal court jurisdiction (*Altmann*), and the exposure from that date of those separate entities newly re-defined by 28 U.S.C. § 1603(b)(2) as facing similar risks and having entitlement to "some" immunity (*Dole*). Neither *Altmann* nor *Dole*, both of which are distinguishable on their facts from the case at bar, locates a legislative intent to benefit separate corporate entities as such, for which the principle of comity was never intended to apply. Neither case leads to the conclusion that this Court has found in the FSIA the intent to cloak with immunity for pre-1976 conduct those separate and independent entities newly re-configured as "instrumentalities" by the statute. Instead, this Court's emphasis is on comity to sovereign governments.[12]

Foreign governments have always been able to claim immunity, although the scope of that claim has varied considerably over the years, based substantially on foreign policy concerns and the consequent application of grace and comity, as opposed to a settled rule of law. Thus, while foreign governments always have an interest and a claim to immunity, they have no fixed and settled expectation of precisely what

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[12] The design of the FSIA is "henceforth" to immunize actual sovereign governments for conduct, whenever occurring, not covered by a statutory exception, and to alert them from 1976 on as to which of their related entities will "henceforth" be either immunized or excepted from immunity for post-1976 conduct.

the scope of that immunity will be. It is reasonable then to conclude, as *Altmann* does, that the sovereign must accept the intrinsic fluidity of the situation, which includes the potential retroactive reach of newly-promulgated rules on the scope of immunity. It is quite another thing to say – and we submit *Altmann* did not say – that the FSIA should be retroactively applied to immunize *non-sovereigns* for acts for which they had always been liable as a matter of settled law.[13]

Neither the FSIA, nor the holdings of this Court in *Altmann* or *Dole*, deal with the situation at bar, namely, the potentially retroactive application of radically changed legal principles to the conduct of a separate corporate entity long before enactment of the FSIA, defined as an "instrumentality" in 1976, and now being sued for its pre-1976 actions as a separate corporate entity.[14] By material contrast, though, one hundred fifty years of consistent jurisprudence hold that SNCF was always amenable to suit for conduct pre-dating the enactment of the FSIA. And SNCF's own actual expectations in this regard are not a matter of conjecture; SNCF never claimed immunity despite being sued repeatedly in the United States courts.

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[13]Such a result would be inconsistent with the expressed Congressional intent in enacting the FSIA to clarify and codify then-existing sovereign immunity law. *See Altmann*, 124 S. Ct. at 2249.

[14]The majority opinion in *Altmann* mentions *Dole*, among other cases, to support its holding that the FSIA was intended to apply to pre-enactment conduct. *Altmann*, 124 S. Ct. at 2253. But, that the FSIA is held to apply to pre-enactment conduct of sovereigns does not mean that it applies to pre-enactment conduct of separate corporate entities that were amenable to suit at that time. Indeed, to the extent that "conduct" is considered in *Dole*, it is solely that of the sovereign. Respectfully, neither the facts of *Dole* which involved no pre-enactment conduct, nor its holding, so require.

CONCLUSION

SNCF, as a private actor with no historical right to sovereign immunity, does not come within the holding of *Altmann*, which neither considered nor decided anything about the way a separate corporate entity would have been treated before enactment of the FSIA. *Altmann* does not require the retroactive application of the FSIA to pre-FSIA conduct by entities whose commercial conduct was never previously subject to immunity. *Altmann* does not reject the validity of considering the rights of plaintiffs in determining the retroactive reach of a statute. In this case, the Second Circuit should have conducted a *Landgraf* analysis consistent with the Court's action in *Altmann*. Such analysis would have found, for the reasons set forth above, that the FSIA is not retroactive to private entities and should not be used to create immunity for events preceding its enactment. The Second Circuit was wrong in dismissing this case.

For all these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DATED NOVEMBER 9, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: October 3, 2002 Decided: June 13, 2003)

(Vacated and Remanded: June 14, 2004)

(Decided: November 9, 2004)

Docket No. 01-9442

RAYMONDE ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN JACQUES FRAENKEL, LILIANE LICHTETEIN, MARIE WEINRAUCH,

Plaintiffs-Appellants,

v.

SOCIETÈ NATIONALE DES CHEMINS DE FER FRANCAIS,

Defendant-Appellee.

Before: CARDAMONE, MINER, and SOTOMAYOR,

Circuit Judges.

On remand from the United States Supreme Court, which vacated and remanded for further consideration in light of *Republic of Austria v. Altmann*, 541 U.S. ___, 124 S. Ct. 2240 (2004). We recall our prior mandate and now affirm the district court's dismissal of plaintiffs' complaint.

Affirmed:

Stephen T. Rodd, Abbey Gardy, LLP, New York, New York (Harriet Tamen, Hurt, Levine & Papadakis, New York, New York; Professor Richard H. Weisberg, Benjamin Cardozo School of Law, New York, New York; Professor Lucille A. Roussin, New York, New York; Clifford James, Fensterstock & Partners, LLP, New York, New York; Professor Malvina Halberstam, Benjamin Cardozo School of Law, New York, New York; Gregory L. Tesoro, New York, New York, of counsel), *filed a letter brief for Plaintiffs-Appellants.*

Professor Andreas F. Lowenfeld, New York University School of Law, New York, New York (Professor Linda J. Silberman, New York University School of Law, New York, New York; Steven C. Bennett, Jones Day, New York, New York, of counsel), *filed a letter brief for Defendant-Appellee.*

Sharon Swingle, U.S. Department of Justice, Civil Division, Washington, D.C., *filed a letter brief for the United States of America as Amicus Curiae.*

PER CURIAM:

The named plaintiffs brought suit, individually and on behalf of other Holocaust victims and their heirs and beneficiaries, against the French national railroad company, Societe Nationale des Chemins de Fer Francais (SNCF or railroad). Plaintiffs allege that SNCF has committed war crimes and crimes against humanity, under customary international law and the law of nations, by knowingly transporting tens of thousands of French civilians to Nazi death and slave labor camps. During the time when these atrocities were committed, SNCF remained under independent civilian control. It has since been wholly acquired by the French government.

Plaintiffs filed their complaint in the United States District Court for the Eastern District of New York before Judge David G. Trager. The district court dismissed plaintiffs' claims, based on its conclusion that it lacked subject matter jurisdiction because SNCF was an "agency or instrumentality of a foreign state" under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1603(b) (1976). It ruled that none of the Act's exceptions for foreign sovereign immunity applied. *Abrams v. Société Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423, 433 (E.D.N.Y. 2001). Plaintiffs appealed to this Court, contending that the application of the Act to their claims is impermissibly retroactive. Plaintiffs have maintained that the jurisdictional and immunity questions should be resolved based on the laws in effect at the time of the alleged misconduct and, hence, that SNCF was not entitled to sovereign immunity as it was a private entity separate and distinct from the French government. Plaintiffs also cross-moved for further discovery on the immunity issue.

We vacated the district court's order and remanded for further proceedings. *Abrams v. Société Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003). In agreement with the district court's threshold determination, we first held that SNCF is an agency or instrumentality of France under the FSIA. But, we further held that the record was insufficient to determine whether the FSIA applies to pre-enactment conduct. Specifically, we ruled that the issue of subject matter jurisdiction could not be resolved in the

absence of information with respect to the State Department's position during World War II on the significance of the corporate form in foreign sovereign immunity determinations. We also believed that information on whether the State Department would have recognized immunity in a case such as the one before us would be a relevant consideration.

The United States Supreme Court granted the defendant's petition for a writ of certiorari. *Société Nationale des Chemins de Fer Francais v. Abrams*, 541 U.S. ___, 124 S. Ct. 2834 (2004). The Court vacated our decision and remanded for further consideration in light of *Republic of Austria v. Altmann*, 541 U.S. ___, 124 S. Ct. 2240 (2004). Thereafter, at our request, the parties filed supplemental briefs.

DISCUSSION

We have now reconsidered this case in light of *Altmann*. In *Altmann*, the Supreme Court held that the FSIA applies to conduct prior to its enactment and prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. The Court reasoned that deference to the Act's foreign sovereign immunity determinations was appropriate even where the Act postdates the conduct in question (as it does here), because the purpose of sovereign immunity is not to assist foreign states in "shaping their conduct in reliance on the promise of future immunity," but "to reflect[] current political realities and relationships." *Id.* at 2252. In so doing, the Court concluded that the retroactivity analysis established in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and upon which this panel had relied, was inappropriate. Further, the Supreme Court stated that the Act's preamble, as well as its overarching thematic structure, indicated Congress' design for the Act to apply retroactively. *Altmann*, 124 S. Ct. at 2253-54.

After *Altmann*, it is no longer necessary to rely upon the State Department's past determinations in ascertaining whether FSIA's application to pre-enactment wrongdoing is impermissibly retroactive. Indeed, in its holding, the Supreme Court expressly disapproved of this historical approach, which a number of Circuits had previously utilized.

Id. at 2254. The Court's sanctioning of continued involvement from the State Department refers only to certain situations, which are inapplicable here. *Id.* at 2255. That is, the views of the State Department are likely only relevant when a court has subject matter jurisdiction and yet there is still strong executive interest in granting immunity or there is an ambiguity regarding an FSIA exception.

In their supplemental briefing, appellants argue that a distinction can be drawn between SNCF and the Altmann defendants in that the former, unlike the latter, was a non-governmental entity at the time of the alleged misconduct. This fact is immaterial after *Altmann*. In determining immunity of a foreign sovereign, *Altmann* deems irrelevant the way an entity would have been treated at the time of the alleged wrongdoing. Thus, the distinction between a corporate entity and a government entity now only speaks to whether the tortfeasor is a sovereign, or alternatively an "agent" or "instrumentality" of the sovereign, and hence to whether FSIA is applicable at all. While SNCF was predominantly owned by civilians during World War II, it is now wholly-owned by the French government and, as we have previously ruled, is an "agent" or "instrumentality" of France under the FSIA. *Abrams*, 332 F.3d at 180; *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 480 (2003) (holding unequivocally that an entity's status as an instrumentality of a foreign state should be "determined at the time of the filing of the complaint"). Once the railroad is encompassed by the FSIA, its prior incarnation as a private entity does not bar the statute's retroactive application.

Appellants misapprehend the *Altmann* holding by stating that it "turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit." Appellants maintain that *Altmann* analyzed the relevant historical expectations of the parties and that we should do the same to find that SNCF, as a private entity at the time of the alleged wrongdoing, had no expectation of immunity. The Supreme Court stated, to the contrary, that reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles because immunity simply "reflects current political realities and relationships." *Altmann*, 124 S. Ct. at 2252.

Finally, appellants contend that principles of grace and comity do not apply to SNCF because it was a private entity. Yet, government instrumentalities are entitled to these international norms, and the *Dole Food* Court's holding eviscerates any possibility that SNCF could escape characterization as such. *See* 538 U.S. at 480. In fact, appellant's emphasis upon the narrow "*sui generis*" context of Altmann overlooks the fact that the FSIA now encompasses separate entities that have since been acquired by government entities. *See Altmann*, 124 S. Ct. at 2252 ("In this *sui generis* context, we think it more appropriate, absent contraindications, to defer to the most recent such decision -- namely, the FSIA -- than to presume that decision *inapplicable* merely because it postdates the conduct in question.").

While appellants may be correct in asserting that "applying the FSIA to impair plaintiff's rights against a separate corporation engaged in commercial activity would be impermissibly retroactive," the same cannot be said for the case of a separate corporation that has since been acquired by a sovereign. We are bound by the Supreme Court's decision to defer to comity rather than to approach the situation from the perspective of the injured plaintiffs whose rights have now been altered. Accordingly, the evil actions of the French national railroad's former private masters in knowingly transporting thousands to death camps during World War II are not susceptible to legal redress in federal court today, because defendant has since become a part of the French government and is therefore immunized from suit by the Foreign Sovereign Immunities Act. Nonetheless, the railroad's conduct at the time lives on in infamy.

CONCLUSION

For the reasons explained above, we recall our mandate issued to the district court in *Abrams*, 332 F.3d 173 (2d Cir. 2003), and thereby affirm the district court's dismissal of plaintiffs' complaint for lack of subject matter jurisdiction.

Affirmed.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DATED JUNE 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: October 3, 2002 Decided: June 13, 2003)

Docket No. 01-9442

RAYMONDE ABRAMS, NICOLE B. SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN JACQUES FRAENKEL, LILIANE LICHTETEIN, MARIE WEINRAUCH,

Plaintiffs-Appellants,

v.

SOCIETÈ NATIONALE DES CHEMINS DE FER FRANCAIS,

Defendant-Appellee.

Before: CARDAMONE, MINER, and SOTOMAYOR,

Circuit Judges.

* * *

CARDAMONE, *Circuit Judge.*

The named plaintiffs have brought this action individually and on behalf of other similarly situated Holocaust victims and their heirs against the French railroad company Societe Nationale des Chemins de Fer Francais (SNCF or railroad). The action arises out of SNCF's 1942-1944 operation of trains that transported tens of thousands of French civilians to the infamous Nazi death and slave labor camps. Plaintiffs allege that in so doing SNCF committed war crimes and crimes against humanity under customary international law and the law of nations. Customary international law, plaintiffs further allege, is enforceable in federal district court as federal common law.

Plaintiffs filed their complaint in the United States District Court for the Eastern District of New York before Judge David G. Trager on September 12, 2000. When SNCF moved to dismiss it for lack of subject matter jurisdiction, the district court granted the motion, ruling that SNCF was an "agency or instrumentality of a foreign state" as that term is defined in the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. § 1603(b), and that, because plaintiffs' claims did not fall within any of the Act's exceptions to foreign sovereign immunity, it was without jurisdiction to adjudicate them. *Abrams v. Societe Nationale des Chemins de Fer Francais,* 175 F. Supp. 2d 423, 428-29, 450 (E.D.N.Y. 2001). On appeal, as in district court, plaintiffs urge that the FSIA does not apply to this case because it arises out of events predating the statute's 1976 enactment.

BACKGROUND

The following facts are alleged in the complaint and are accepted as true, as they must be at this stage of the litigation. SNCF, the national railway of France, was created in the late 1930s by consolidation of five then-existing French regional rail networks. Today it is operated as a separate legal entity wholly-owned by the French government. During the Nazi occupation of France the railroad remained under

civilian control and preserved its independence by collaborating with the German authorities and by accommodating their transportation needs.

In March 1942 at the request of those authorities, SNCF began to operate trains deporting Jews and other so-called "undesirables" from France to Nazi concentration camps. In exchange for this assistance, the railroad was allowed to continue its operations and was paid for the transport it provided. The conditions inside the deportation trains were inhumane and frequently fatal to passengers who were often carried in cattle cars. Sanitation facilities were limited or nonexistent and passengers had to endure extreme heat and cold. Many did not live to the journey's end. By the time the Nazi occupation of France was over, SNCF had conveyed more than 72 deportation convoys, taking to concentration camps 75,000 Jews and tens of thousands of others. Fewer than three percent of those deported survived. The trains' ultimate destinations included unspeakable places like Dachau and Auschwitz, and these destinations and the conditions of travel were well known to those running the railroad.

The named plaintiffs are either survivors of those deportations or their heirs and descendants. They commenced suit against SNCF both in their individual capacities and on behalf of a putative class of all members of the civilian population of France transported by SNCF to the Nazi camps, and their respective heirs and beneficiaries. The complaint sought compensatory and punitive damages as well as disgorgement of wrongfully obtained profits.

The railroad moved to dismiss the complaint on two grounds: first, it asserted that federal courts in the United States had no subject matter jurisdiction over plaintiffs' causes of action; second, it contended it was entitled to sovereign immunity, both under the FSIA and under the laws in effect during World War II. In support of its motion, SNCF submitted affidavits from its attorneys containing information regarding the railroad's present organization and ownership. The railroad's attorneys confirmed that it is now organized as a separate legal entity, which is wholly-owned and controlled by the French government.

In opposing the motion to dismiss their complaint, plaintiffs contended that applying the Act to their claims would be impermissibly retroactive, and that questions of jurisdiction and immunity should be resolved based on laws in effect in the 1940s at the time the railroad's underlying conduct occurred. Under those laws, plaintiffs maintain, SNCF was not entitled to sovereign immunity because it was organized as a corporate entity separate and distinct from the French government. Plaintiffs also cross-moved for discovery, declaring that whether SNCF is entitled to immunity cannot be resolved based on the existing record.

In granting SNCF's motion to dismiss and denying plaintiffs' cross-motion for discovery the district court first found that the railroad fits on all fours into the definition of an agency or instrumentality of a foreign state under the terms of the Act. Substantially adopting the reasoning in *Princz v. Federal Republic of Germany,* 307 U.S. App. D.C. 102, 26 F.3d 1166 (D.C. Cir. 1994), it further ruled that, to the extent that the Act defines the scope of federal courts' jurisdiction over claims against foreign states, the statute applies to actions commenced after its enactment regardless of when the underlying conduct occurred. The district court further ruled that the FSIA's jurisdictional grant does not encompass plaintiffs' cause of action. *Abrams,* 175 F. Supp. 2d at 450. It found it unnecessary to decide whether plaintiffs could have brought their cause under laws in effect in the 1940s. *Id.* at 446.

Although we agree with the district court that SNCF is an agency or instrumentality of France under the FSIA, the existing record is insufficient for us to resolve the question of whether that Act's application to plaintiffs' causes of action would be impermissibly retroactive. Hence, we vacate and remand.

DISCUSSION

I. Standard of Review

Upon reviewing a district court's determination with respect to its subject matter jurisdiction under the FSIA, we examine the court's legal conclusions de novo and its factual

findings for clear error. *Robinson v. Gov't of Malay.*, 269 F.3d 133, 138 (2d Cir. 2001). Because the district court did not have to make any factual findings, and dismissed the complaint solely on its resolution of questions of law, our review is *de novo*.

II. Foreign Sovereign Immunity in Federal Courts

A. Prior to the FSIA's Enactment

Foreign sovereign immunity has been a recognized doctrine of American law since the seminal Supreme Court case *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 3 L. Ed. 287 (1812). In *The Schooner Exchange*, two American citizens claimed ownership of a ship they alleged had been wrongfully seized by the French navy. The United States Attorney for the District of Pennsylvania filed a suggestion of immunity with the district court, thereby raising a question of sovereign immunity. *Id.* at 117-18. The Supreme Court agreed that immunity existed and dismissed the Americans' claim to the ship. *Id.* at 147. In an opinion by Chief Justice Marshall, the Court explained that the "perfect equality and absolute independence" of sovereign nations required that United States courts refrain from exercising jurisdiction over claims against other states. *Id.* at 137.

From that beginning until the FSIA's enactment in 1976, the executive branch played a prominent role in deciding whether a foreign sovereign was immune from suit in American courts. *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-87, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983); Restatement (Third) of Foreign Relations Law of the United States [hereafter Restatement 3d] pt. IV, ch. 5, subch. A, introductory note (1987). Foreign states sued in the United States often requested that the Department of State ask the Department of Justice to file a suggestion of immunity with the courts. *See* Restatement 3d, pt. IV, ch. 5, subch. A, introductory note.

Courts, for their part, usually deferred to the decision of the executive, reasoning that the preferable method of resolving disputes with friendly foreign states is not litigation but diplomatic negotiation, a matter within the authority and ex-

pertise of the executive branch. See *Ex parte Republic of Peru,* 318 U.S. 578, 586-87, 87 L. Ed. 1014, 63 S. Ct. 793 (1943); *see also Republic of Mexico v. Hoffman,* 324 U.S. 30, 35, 89 L. Ed. 729, 65 S. Ct. 530 (1945) (reasoning that "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs"). In the 1940s, the Supreme Court expressly endorsed deference to the executive as "a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases." *Hoffman,* 324 U.S. at 35; *see also Peru,* 318 U.S. at 586-87 (accepting a claim of immunity where the Secretary of State had undertaken to settle the dispute through diplomatic channels).

Prior to 1952, the United States adhered to the absolute theory of foreign sovereign immunity. See Restatement 3d, pt. IV, ch. 5, subch. A, introductory note. Under that theory, a sovereign cannot be sued in the courts of another state without that sovereign's consent, regardless of the nature of the activity giving rise to the action. See Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General of the United States (May 19, 1952) [hereafter Tate Letter], reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. 682, 711-15, 48 L. Ed. 2d 301, 96 S. Ct. 1854 (1976). As foreign states increasingly began to participate in international commerce, an alternative to the theory of absolute immunity emerged called the restrictive theory of sovereign immunity. See Restatement 3d pt. IV, ch. 5, subch. A, introductory note. Under that theory, a foreign state is immune from claims arising out of the state's governmental activities, but not immune from claims arising out of its commercial activities. *See id. § 451, cmt. a.* The United States adopted the restrictive theory in 1952 when the Department of State announced its formal change of policy in a letter from Acting Legal Adviser Jack Tate to the Acting Attorney General. *See* Tate Letter, reprinted in *Alfred Dunhill,* 425 U.S. at 714.

After the Tate Letter, the State Department continued to decide most of foreign states' immunity claims. In those cases where the foreign government did not request the State Department's intervention, the duty to resolve the immunity question in the first instance fell to the courts. *Verlinden,* 461

U.S. at 487. Sovereign immunity determinations were thus made in two different branches of government resulting in rules that were neither clear nor uniform. *Id.* at 488; *see also* Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations,* 32 Stan. J. Int'l L. 159, 165 (1996) (discussing difficulties in application of the restrictive theory between 1952 and 1976); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. Mar. L. & Com. 257, 259-60 (1997) (same). Litigation of claims against foreign states was further complicated by the absence of effective procedures for service of process and by the lack of satisfactory standards for execution of judgments against foreign states. *See* Abir, *supra, at 165*; Dorsey, *supra,* at 260.

As a result of these inadequacies Congress in 1976 enacted the FSIA, a statute aimed "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assure litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden,* 461 U.S. at 488 (quoting H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

B. The FSIA

The Act was designed to codify the restrictive theory of sovereign immunity and to remove the subject from diplomatic pressures by transferring such decisions to the judiciary. Standards were imposed for serving process, obtaining personal jurisdiction, and executing judgment in an action against a foreign state. See H.R. Rep. No. 94-1487 [hereafter House Report], at 7-8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605-06. For purposes of our analysis, the Act can be divided into three main parts: (1) statement of jurisdiction of the federal courts, (2) exclusions from jurisdiction and definition of immunities, and (3) other standards and rules. See Restatement 3d pt. IV, ch. 5, subch. A, introductory note. While the third group of provisions is largely irrelevant in the instant case, the first two parts warrant a brief overview.

1. Statement of Jurisdiction

The FSIA added to Title 28 of the United States Code a new jurisdiction-conferring provision, § 1330. Section 1330 granted federal district courts "original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title [the immunity-defining provisions] or under any applicable international agreement." Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 2, 1976 U.S.C.C.A.N. (90 Stat.) 2891, 2891 (codified at 28 U.S.C. § 1330). The statutory definition of a foreign state includes its agencies and instrumentalities. *See* 28 U.S.C. § 1603(a).

The FSIA also amended the diversity jurisdiction provision, § 1332. That amendment eliminated jurisdiction over actions against foreign states, and this section refers now only to suits where a foreign state is a plaintiff. *See* FSIA § 3, 1976 U.S.C.C.A.N. (90 Stat.) at 2891 (codified at 28 U.S.C. § 1332). The House Report explained that, because under the FSIA "jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 [became] superfluous." House Report at 14, reprinted in 1976 U.S.C.C.A.N. at 6613.

The Act did not expressly amend other jurisdiction-granting statutes. In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 102 L. Ed. 2d 818, 109 S. Ct. 683 (1989), the Supreme Court rejected an argument that this silence indicated Congress' intent to retain claims against foreign states within the scope of jurisdictional provisions other than the new § 1330, such as the general admiralty and maritime jurisdiction statute, 28 U.S.C. § 1333(1), or the Alien Tort Claims Statute, 28 U.S.C. § 1350. Relying on the FSIA's comprehensiveness, as well as on its language and legislative history, the Court held that, after the FSIA's enactment, that statute "provides the sole basis for obtaining juris-

diction over a foreign state in federal court." *Id.* at 439. Further, Congress did not have to amend all other existing jurisdictional statutes to ensure the Act's exclusivity. Unlike the diversity provision, other statutes conferring jurisdiction in general terms on district courts had not previously expressly provided for suits against foreign states. *Id.* at 437 n.5. Thus, the Court concluded, Congress stated that "'claims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with [the FSIA],' and very likely it thought that should be sufficient." *Id.* at 437-38 (quoting 28 U.S.C. § 1602).

2. Exclusions From Jurisdiction and Definition of Immunities

The Act added to Title 28 a new chapter, §§ 1602-1611, in which it set out a comprehensive set of standards for federal and state courts' determinations of foreign sovereigns' claims of immunity. See FSIA § 4, 1976 U.S.C.C.A.N. (90 Stat.) at 2891-97 (codified at 28 U.S.C. §§ *1602-1611*); House Report at 14, reprinted in 1976 U.S.C.C.A.N. at 6613. The newly added *§ 1604* declares that, subject to existing international agreements to which the United States was a party at the time of the FSIA's enactment, foreign states are immune from the federal and state courts' jurisdiction unless the FSIA itself provides otherwise. *See* § 1604.

Section 1605 then lists general exceptions to immunity consistent with the restrictive theory. *See id.* § 1605. For example, it provides that foreign states are not immune from claims arising out of their commercial activities within the United States or out of their commercial activities elsewhere that cause a direct effect in the United States. *See id.* § 1605(a)(2). Sections 1606 and 1607 address the scope of foreign states' exposure to liability for punitive damages and to counterclaims. *See id.* §§ 1606-07.

III. Role of the FSIA in This Appeal

In their complaint plaintiffs alleged federal subject matter jurisdiction under two statutes: the federal question statute, 28 U.S.C. § 1331, and the Alien Tort Claims Statute, 28 U.S.C. § 1350, which confers on district courts original ju-

risdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States," *id.* The Supreme Court's holding in Amerada Hess instructs that, if the FSIA applies, neither of the mentioned statutes can serve as a jurisdictional predicate for this action, and district courts may entertain the case based solely on the jurisdictional provision of the FSIA, 28 U.S.C. § 1330. 488 U.S. at 443. As noted, that section gives district courts jurisdiction over claims against foreign states only when such claims fall within the FSIA's exceptions to the general grant of immunity for foreign states.

Here, the trial court ruled that none of those exceptions applies. Plaintiffs do not contest this ruling, agreeing that if the FSIA applies, the district court has no jurisdiction. The thrust of their argument is that the FSIA does not apply to their claims. Thus, we turn now to the first of the two issues determinative of the Act's applicability -- SNCF's status as a state actor.

IV. Railroad's Status as French Agency or Instrumentality

Because the Act applies to claims brought against foreign states, their political subdivisions, and their agencies and instrumentalities, *see* 28 U.S.C. § 1603(a), deciding whether it applies in this case presents the threshold issue of whether SNCF is an agency or instrumentality of France. The district court concluded that it is. We agree.

Under the Act, an entity is an agency or instrumentality of a foreign state if it meets the following three requirements: first, it must be "a separate legal person, corporate or otherwise"; second, it must be "an organ of a foreign state or political subdivision thereof, or a majority of [its] shares or other ownership interest [must be] owned by a foreign state or political subdivision thereof"; third, it must be "neither a citizen of a State of the United States . . . nor created under the laws of any third country." *Id.* § 1603(b).

In the case at hand, the complaint and the documents submitted by the parties clearly establish that SNCF has had the required characteristics of an agency or instrumentality of

France throughout the course of this litigation. It is undisputed that SNCF is now -- and was at the time the complaint was filed -- a separate legal entity, wholly-owned by the French government, neither organized under the laws of any third country nor a citizen of any state of the United States.

The evidence in the record does not establish, however, that SNCF also had these three characteristics during World War II. For example, though the railroad's brief asserts that the French state owned 51 percent of the company between 1938 and 1982, no affidavits or documents in the record support this statement. This absence of proof regarding the railroad's status during World War II raises the question: Is the fact that the defendant entity fits the FSIA's definition of an agency or instrumentality of a foreign state at the time of the litigation sufficient to require the Act's application to the case, regardless of that entity's organization and ownership at the time of the alleged wrongdoing?

The issue was unresolved in our Circuit both at the time of the district court's decision in this case and at the time the parties briefed and argued the present appeal. After the oral argument, however, the Supreme Court decided *Dole Food Co. v. Patrickson,* 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), holding unequivocally that an entity's status as an instrumentality of a foreign state should be "determined at the time of the filing of the complaint." *Id.* at 1663. Because the record clearly establishes that SNCF was an agency or instrumentality of France at the time the complaint was filed, it is an agency or instrumentality of a foreign state as defined in § 1603(b).

V. Retroactivity

We pass now to the second question that we must resolve: whether the Act may be applied to this case even though the underlying events occurred before that statute's enactment. Citing the Supreme Court's decisions in *Landgraf v. USI Film Products,* 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), and *Hughes Aircraft Co. v. United States,* 520 U.S. 939, 138 L. Ed. 2d 135, 117 S. Ct. 1871 (1997), plaintiffs declare Congress did not unequivocally express its aim that the Act apply to pre-enactment events. In the ab-

sence of such an unequivocal statement, they continue, application of the statute to their claims would be impermissibly retroactive as it would impair their antecedent rights and settled expectations. We agree there is no unequivocal statement, but find the existing record insufficient to assess the accuracy of plaintiffs' retroactivity argument.

A. Governing Legal Principles

1. *Landgraf/Lindh* Framework

In *Landgraf*, the Supreme Court established a two step approach to determining whether a statute applies to events predating its enactment. First, a court must ask "whether Congress has expressly prescribed the statute's proper reach." 511 U.S. at 280. If Congress has done so, the inquiry ends. If not, the court must determine whether applying the statute to pre-enactment events "would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* If the statute's application would have such an effect, the court must decline to apply it. *Id.* This traditional presumption against retroactive legislation, Landgraf explained, is rooted in fundamental notions of fairness which dictate that "settled expectations should not be lightly disrupted" and "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Id.* at 265.

Lindh v. Murphy, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997), elaborated on Landgraf, holding that the normal rules of construction generally apply when a court determines the temporal reach of a statute. *Id.* at 326. Absent a clear and express Congressional directive to apply a statute retroactively, the Court stated, applying a statute to pre-enactment events may be inappropriate for more than one reason. First, as discussed in *Landgraf*, such application could produce a retroactive effect, and therefore be barred by the customary presumption against retroactivity. In addition, other regular rules of statutory interpretation could "remove even the possibility of retroactivity," by revealing that Congress planned solely for a prospective application. *Id.* For

example, in *Lindh*, an amendment to the habeas corpus statute was held inapplicable to non-capital cases pending at the time of the amendment's enactment. The Court noted that a simultaneously enacted provision on capital cases expressly required application to then-pending cases, and reasoned that this express requirement, by negative implication, showed that the amendments pertinent to non-capital cases were meant to apply only to cases filed after the amendments' enactment. *Id.* at 326-37.

After *Lindh*, therefore, a court faced with a retroactivity claim that survived the first step of the *Landgraf* analysis may not have to decide whether the statute produces a retroactive effect. Instead, by referring to other rules of statutory interpretation, the court may find the statute inapplicable to pre-enactment events.

2. Applicability of *Landgraf* to New Jurisdiction-Allocating Legislation

SNCF avers the *Landgraf* analysis does not apply to those aspects of the FSIA that govern federal courts' jurisdiction, that is, the enactment of the exclusive jurisdictional basis for claims against foreign states set out in § 1330 and the simultaneous exclusion of such claims from other general jurisdictional provisions. We disagree with the railroad's contention.

In *Landgraf*, the Supreme Court recognized that, "even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." 511 U.S. at 273. The Court noted jurisdiction-conferring and jurisdiction-ousting statutes as an example of statutes often properly applied to pre-enactment events. "Application of a new jurisdictional rule," the Court instructed, "usually takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* at 274. Further, "present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Id.*

Landgraf did not suggest that all jurisdiction-defining statutes should be applied to all currently pending lawsuits,

or that courts do not have to consider the effects of having such statutes cover pre-enactment events. To the contrary, the Court's use of the adverbs "usually" and "normally" suggests that it did not intend to create a categorical exception from the general retroactivity analysis for jurisdictional statutes.

Three years later, in *Hughes Aircraft*, the Court confirmed that the general presumption against retroactivity affects jurisdiction-allocating statutes to the same extent that it affects other legislation. 520 U.S. at 950-51. At issue in Hughes Aircraft was the temporal reach of a 1986 amendment to the False Claims Act that expanded the range of circumstances in which private parties can bring suit "on behalf of the United States against anyone submitting a false claim to the Government." *Id.* at 941. After conducting the two-step analysis outlined in *Landgraf*, the Supreme Court concluded that the 1986 amendment did not apply where the defendant submitted the alleged false claims before 1986 and a private person could not have brought suit based on those claims under the pre-amendment version of the False Claims Act. *Id.* at 946-51.

In rejecting plaintiff's argument that the 1986 amendment, as a jurisdictional statute, was exempt from the *Landgraf* presumption against retroactivity, the Supreme Court clarified *Landgraf*, stating

> The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself. . . . As we stated in *Landgraf*:
>
> "Application of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties.'"

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all. The 1986 amendment, however, does not merely allocate jurisdiction among forums. Rather, it *creates* jurisdiction where none previously existed; it thus speaks not just to the power of a particular court but to the substantive rights of the parties as well. Such a statute, even though phrased in "jurisdictional" terms, is as much subject to our presumption against retroactivity as any other.

Id. at 951.

In light of the quoted passage from *Hughes Aircraft*, the railroad's argument that we should apply the jurisdiction-allocating aspects of the Act to pre-1976 events without first engaging in the *Landgraf* analysis is misplaced. Nor are we persuaded by the railroad's view that the quoted passage pertains only to jurisdiction-creating statutes, and thus does not apply to the jurisdiction-ousting aspects of the FSIA, that is to say, the express amendment of the diversity statute and the implied limitation on other general jurisdictional grants recognized in *Amerada Hess*. As discussed in Part II B. above, the enactment of the Act's jurisdiction-conferring provision for claims against foreign states in § 1330 is the very reason that other jurisdictional grants no longer govern such claims. Hence, Congress plainly aimed to have the FSIA's jurisdictional ouster applied coextensively with its jurisdictional grant.

More importantly, the railroad's argument misses the central point of the quoted passage from *Hughes Aircraft*: although jurisdictional statutes are often applied to pre-enactment events, they are not categorically exempt from the *Landgraf* analysis. If the particular jurisdictional statute "affects only where a suit may be brought, not whether it may be brought," its application to all currently pending cases usually will not have the impermissible retroactive effect discussed in *Landgraf* and, therefore, will "fail[] to meet the

conditions for our generally applicable presumption against retroactivity." *Hughes Aircraft,* 520 U.S. at 951; *cf. Scott v. Boos,* 215 F.3d 940, 944-47 (9th Cir. 2000) (rejecting as impermissibly retroactive application of new statute that, although phrased as an exception to existing federal jurisdictional provision, barred plaintiff from asserting in state or federal court a claim he could have pursued at the time of the alleged misconduct); *Mathews v. Kidder, Peabody & Co., Inc.,* 161 F.3d 156, 163-66 (3d Cir. 1998) (same).

3. *Princz*

In urging us to forgo the Landgraf analysis, SNCF relies heavily on *Princz v. Federal Republic of Germany,* 307 U.S. App. D.C. 102, 26 F.3d 1166 (D.C. Cir. 1994). In *Princz*, the plaintiff, a Holocaust survivor, sued the Federal Republic of Germany for injuries suffered in Nazi concentration camps during World War II. *Id.* at 1168. Dismissing plaintiff's claims for lack of subject matter jurisdiction, the District of Columbia Circuit stated that it did not need to decide whether the FSIA applied to the case. *Id.* at 1168, 1171. If the statute applied, the court reasoned, plaintiff's claims had to be dismissed because they did not fall within any of the FSIA's exceptions to immunity. *Id.* at 1171. On the other hand, if the Act did not apply, plaintiff's claims still had to be dismissed because "there [was] no present basis for subject matter jurisdiction over Mr. Princz's claims in the district court regardless of the state of the circuit law concerning immunity in the period 1942-1945." *Id.* at 1175-76. After the FSIA's enactment, the court continued, the diversity statute, § 1332, no longer encompasses claims against foreign states. At the same time, the new § 1330 jurisdictional provision of the Act, "asserts federal jurisdiction over a suit against a foreign state only insofar as the foreign state is not entitled to immunity under the FSIA," and the court had already found no pertinent exception to immunity. *Id.* at 1176.

We are unable to agree with the *Princz* court's view that it did not have to and in fact did not decide the issue of the FSIA's applicability. To the contrary, in the second prong of its analysis the majority clearly applied both the FSIA's new

jurisdiction-conferring provision, § 1330, and the amended, post-FSIA version of the diversity statute, 28 U.S.C. § 1332.

Further, *Princz* did so without answering either of the two questions posed by *Landgraf*: (1) has Congress clearly expressed its intent that these FSIA provisions be applied to lawsuits based on pre-1976 events, and, if not, (2) would the application of these provisions to the plaintiff's claims have a retroactive effect. Instead, *Princz* noted only that it was not aware of any case law "suggesting that a court can revive the pre-FSIA diversity jurisdiction" over claims against foreign states. 26 F.3d at 1171. Thus, it apparently accepted as axiomatic that the basis for federal subject matter jurisdiction must be found among the jurisdiction-conferring statutes in effect at the time of the lawsuit. As we explained above, in our view such an approach cannot be reconciled with the Supreme Court's discussion of jurisdiction-allocating statutes in Landgraf and, more recently, in Hughes Aircraft.

In consequence, we decline the railroad's invitation to adopt the reasoning of *Princz* and proceed instead to analyze the Act's applicability to this case under the analytical framework outlined in *Landgraf* and *Lindh*.

B. *Landgraf/Lindh* Analysis Applied

1. Express Command Lacking to Apply FSIA Retroactively

Under *Landgraf*, the first question is whether Congress clearly expressed its aim that the statute apply to pre-enactment events. We conclude it did not. In *I.N.S. v. St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001), the Supreme Court explained that the standard for finding the requisite "unambiguous direction" under Landgraf "is a demanding one." *Id.* at 316. "Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-17 (quoting *Lindh*, 521 U.S. at 328 n.4). For instance, we found this standard satisfied in *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001), where a statute expanding the definition of the term "aggravated felony" expressly stated that the new definition applies

"regardless of whether the conviction was entered before, on, or after" the date of the statute's enactment. *Id.* at 110.

In the case at hand, the rigorous requirement of an unambiguous Congressional direction is not satisfied. The closest Congress came to defining expressly the temporal reach of the FSIA was to state that "claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in [that statute]," 28 U.S.C. § 1602 (emphasis added). *See Princz,* 26 F.3d at 1170. The use of the word "henceforth" can reasonably sustain more than one construction. Courts have in fact reached diametrically opposite conclusions regarding Congressional purpose after pouring meaning into this word. *See id.* at 1178 (Wald, J., dissenting) (collecting cases). Some have interpreted the verbiage as suggesting that the Act should cover all cases decided after its enactment, regardless of the time of the underlying events. *See id.* at 1170 (majority opinion). Others have concluded that the word "henceforth" suggests prospective application, meaning application only to suits arising out of post-enactment events – i.e., to some but not all suits filed after the statute's enactment. *See Jackson v. People's Republic of China,* 794 F.2d 1490, 1497 (11th Cir. 1986).

Thus, the statutory language obviously is not so clear as to sustain only one construction and thereby to resolve conclusively the question of Congressional purpose, making additional analysis unnecessary. *Cf. id.* at 1497-98 (proceeding to analyze the FSIA's legislative history, implications of its effective date provision and effect of its application on defendant's antecedent rights to decide whether the statute should apply to claim arising out of pre-1952 events).

The railroad also insists the FSIA's comprehensiveness shows Congress wanted the statute to apply to all suits filed after its enactment. This proposition is not persuasive in light of the Supreme Court's express pronouncement in *St. Cyr* that the comprehensiveness of a statute says nothing with respect to Congress' view regarding the "retroactivity of the enactment's individual provisions." 533 U.S. at 317.

2. Intent to Apply Prospectively

We next turn to the question added to the *Landgraf* analysis in *Lindh*: do ordinary methods of statutory construction establish that the Act's jurisdictional provisions are inapplicable to the pre-enactment events here at issue? We think the answer to that question is no.

As just discussed, Congress' statement that the Act should henceforth govern immunity determinations is ambiguous. Similarly unilluminating is the use of the verb "shall" in the phrase "district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state." 28 U.S.C. § 1330(a). Just as the word henceforth does not necessarily indicate prospective application only, this language does not necessarily signal the statute's applicability only to cases arising out of post-enactment events. Consequently, the use of the cited statutory language may not eliminate the option of retroactive applicability of the statute.

Plaintiffs further maintain that Congress indicated the Act was not retroactive by postponing its effective date for 90 days after enactment "to give adequate notice of the act and its detailed provisions to all foreign states." *See* FSIA § 8, 1976 U.S.C.C.A.N. (90 Stat.) at 2898; House Report at 33, reprinted in 1976 U.S.C.C.A.N. at 6632. We do not discern in this provision any suggestion of the intended temporal reach of the statute. Nor do we consider Congress' inclusion of express retroactivity directives in the 1996 and 1997 amendments to the Act a sound basis for construing a different legislature's silence on the same subject ten years earlier. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 1996 U.S.C.C.A.N. (110 Stat.) 1214, 1241-43 (making amendments on lawsuits against "terrorist states" applicable "to any cause of action arising before, on, or after the date of the enactment of this Act"); Jurisdiction for Lawsuits Against Terrorist States: Technical Correction, Pub. L. No. 105-11, 1997 U.S.C.C.A.N. (111 Stat.) 22, 22 (same).

3. Retroactive Effect

Because other tools of statutory interpretation do not establish the FSIA's inapplicability to this case, we must con-

sider whether its application here would have the retroactive effect described in *Landgraf* and, accordingly, would be barred by the general presumption against retroactivity. What is called for is "a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr,* 533 U.S. at 321.

Plaintiffs declare that having the Act cover the instant case would be impermissibly retroactive because, under laws in effect during World War II, SNCF would not have been immune from this specific suit. Thus, plaintiffs assert, application of the Act to bar their claims deprives them of a right of action they previously had and upsets their settled and legitimate expectation of being able to sue SNCF in the United States.

In *Hughes Aircraft*, the Supreme Court distinguished between two types of nominally jurisdictional statutes. 520 U.S. at 951. Those statutes that affect only where a suit may be brought can generally be applied to currently pending cases without impermissible retroactivity. *Id.* By contrast, statutes that affect whether a lawsuit may be brought at all can produce a retroactive effect if applied to pre-enactment events. *Id.*

Consistent with *Hughes Aircraft*, at least two other circuits have concluded that a new statute has a retroactive effect under Landgraf if the statute, although phrased in jurisdictional terms, does not merely change the forum available to plaintiff, but effectively deprives plaintiff of a claim. *See Scott,* 215 F.3d at 944-47; *Mathews,* 161 F.3d at 163-66. We adopt this view and hold that the FSIA's application to the present litigation would be retroactive in the *Landgraf* sense if, as plaintiffs contend, it fully barred claims that previously could have been adjudicated in the United States.

The question remains therefore whether the Act's application effectively extinguishes plaintiffs' causes of action. In our view, it does. We recognize that, unlike the immunity provisions, the jurisdictional provisions of the Act do not apply to state courts. *See* FSIA § § 2, 3, 1976 U.S.C.C.A.N. (90 Stat.) at 2891 (codified at 28 U.S.C. §§ 1330, 1332).

Hence, it could be argued that application of the jurisdictional provisions simply eliminates federal courts as possible forum choices for plaintiffs, but does not affect plaintiffs' ability to pursue their claims in state courts. There, in turn, plaintiffs could oppose the railroad's immunity defense under the FSIA on retroactivity grounds. Such an interpretation of the Act would expose the railroad to a possibility of being sued in state court, even though the same lawsuit could not be brought in federal court. SNCF appears to adopt this position, urging us to separate the analysis of the Act's applicability into two distinct inquiries: jurisdiction and immunity.

A foreign sovereign's exposure to suit in state courts may not be broader than its exposure to federal courts' jurisdiction under § 1330. To rule otherwise would be inconsistent with Congress' preference that actions involving foreign states be tried in federal courts. Such preference stems, of course, from the sensitivity of actions in American courts against foreign states and the importance of having a uniform, consistent law in this area. House Report at 32, reprinted in 1976 U.S.C.C.A.N. at 6631. The preference is most evident in the FSIA's liberal removal provision that allows a foreign state defendant -- even over objections of co-defendants -- to remove to federal court any civil action brought against it in state court. *See* FSIA § 6, 1976 U.S.C.C.A.N. (90 Stat.) at 2898 (codified at 28 U.S.C. § 1441(d)).

Moreover, an interpretation of the Act that allows for a state court action against a foreign government but excludes the same action from district courts' original jurisdiction under § 1330 leads to an obviously anomalous result. Because a foreign sovereign defendant may always remove a case to federal court, *see* § 1441(d), the action would then be removable to federal court by defendant even though it could not have been originally brought in that court by plaintiff. *See* 28 U.S.C. § 1441(a) (providing generally for removal of actions within federal district courts' original jurisdiction). Accordingly, applying the Act to bar plaintiffs' claims from federal courts does not simply eliminate one of plaintiffs' forum choices, but fully precludes the claims' adjudication in the United States. *Cf. Verlinden,* 461 U.S. at 489 (noting in

dictum that "any claim permitted under the [FSIA] may be brought from the outset in federal court" under § 1330(a)).

The final question is whether plaintiffs could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA's enactment. Plaintiffs aver that before the FSIA expanded the definition of a foreign state to encompass state-owned corporations, courts treated such corporations as legal entities separate from their owners and did not recognize the corporations' claims of sovereign immunity. Some pre-FSIA case law from this Circuit supports plaintiffs' assertion. For example, in *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199 (S.D.N.Y. 1929), it was held that a French government-owned mining corporation was not entitled to immunity because the corporation was an entity distinct from its stockholders. *Id.* at 202-03. Similarly, in *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195 (2d Cir. 1929), we refused to recognize a Swedish railway company's claim of immunity because in its pleadings the company characterized itself as a corporation. *Id.* at 199-200. In rejecting the immunity claim, we reasoned that such a claim must be raised by an accredited representative of the foreign government. *Id.*

SNCF correctly points out that in other cases courts have treated national railroad companies as state instrumentalities. *See Oliver Am. Trading Co. v. Gov't of the United States of Mex.*, 5 F.2d 659 (2d Cir. 1924). For instance, in *Oliver*, we recognized the immunity claim of the National Railways of Mexico, on the ground that "the National Railways of Mexico" was simply the name given a system of railroads in the possession of the Mexican government, controlled and operated by Mexico for ten years for national purposes similar to its running the Post Office, Customs Service, or any other branch of the national government. *Id.* at 661; *see also* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 545-47 (1991) (observing application of separate entity rule to state-owned corporations before FSIA not uniform).

Both sides overlook one crucial aspect of the pre-FSIA law and practice in the United States -- the State Department's role in courts' foreign sovereign immunity determinations. As earlier noted, the State Department often intervened in litigation by filing a suggestion of immunity. Further, even in cases where the State Department did not intervene, courts looked to that agency for guidance and generally acted in accordance with its policies.

The relevance of the State Department's policies to our retroactivity analysis is twofold. First, it appears that the State Department sometimes recognized immunity claims of corporations owned by foreign governments. In *Miller v. Ferrocarril Del Pacifico De Nicaragua,* 137 Me. 251, 18 A.2d 688 (Me. 1941), the State Department recognized a Maine corporation that operated railways within Nicaragua as an instrumentality of the Nicaraguan government, and the court, in turn, granted the company immunity. *Id.* at 690-91.

Second, and more importantly, the State Department's treatment of ordinary litigation with friendly foreign states in times of peace does not necessarily indicate the position the Department would have taken on claims closely related to war-time crimes of an enemy, such as plaintiffs' claims here. Thus, in *Altmann v. Republic of Austria,* 317 F.3d 954 (9th Cir. 2002), the Ninth Circuit held that Austria could not have legitimately expected immunity from suit "for its alleged complicity in the pillaging and retention of treasured paintings from the home of a Jewish alien who was forced to flee for his life" during the Holocaust. *Id.* at 964. In reaching this result, the court relied on a 1949 State Department press release, which announced the Department's policy to "relieve American courts from any restraint upon the exercise of their jurisdiction" with respect to claims for the restitution of identifiable property wrongfully taken as a result of the Nazi persecution in Germany. *Id.* at 965-66.

The record contains no information with respect to the State Department's position during World War II on the significance of the corporate form in foreign sovereign immunity determinations. Nor is there any indication in the record whether the State Department would have recognized immu-

nity in a case such as the one before us. As a consequence, without this information we cannot determine whether plaintiffs legitimately could have expected to litigate their claims in the United States.

CONCLUSION

Accordingly, for the reasons stated, we vacate the dismissal of the complaint and remand the case to the district court for further proceedings consistent with this opinion.

U.S. FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

28 U.S.C § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 exclusive of interest and costs, and is between –

* * *

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a state or of different States. For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

* * * *

28 U.S.C § 1441. Actions removable generally

* * *

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * * *

28 U.S.C § 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their

commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

28 U.S.C § 1603. Definitions

For purposes of this chapter

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C § § 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

28 U.S.C. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case--

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in

the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to--

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable;

or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph--

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if--

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That--

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in the Ship Mortgage Act, 1920 (46 U.S.C. 911 and following). Such action shall be brought, heard, and determined in accordance with the provisions of that Act and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

(e) For purposes of paragraph (7) of subsection (a)--

(1) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages; and

(3) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation.

(f) No action shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

(g) Limitation on discovery.

(1) In general.

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604 but for subsection (a)(7), the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would

significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would--

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence. The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss. A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction. Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States

28 U.S.C § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought

28 U.S.C § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim--

(a) for which a foreign state would not be entitled to immunity under section 1605 of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services--and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted. As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign

state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned

postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a

State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: Provided, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605(a)(7), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the

United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or (7), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered

against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f) (1) (A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7).

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2) (A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7), the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries--

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) Waiver. The President may waive any provision of paragraph (1) in the interest of national security.

28 U.S.C § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.

No. 04-1072

IN THE

Supreme Court of the United States

RAYMOND ABRAMS, NICOLE BE SILBERKLEIT, JANET HERMAN, LILY REDNER, BERNARD CARON, ERNEST HAAR, HARRY CYBULSKI, YVONNE LITMAN, CASSANDRA KIRBY CONAHAY FREUND, JEAN-JACQUES FRAENKEL, LILIANE LICHTENSTEIN and MARIE WEINRAUCH,

Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does immunity from suit in United States courts conferred on instrumentalities of a foreign state by the Foreign Sovereign Immunities Act of 1976 apply to claims based on conduct prior to passage of the Act?

STATEMENT PURSUANT TO RULE 29.6

Respondent Société Nationale des Chemins de Fer Français (SNCF) is a corporation formed under the Laws of France, with the task of operating the French railway and associated facilities. All of the stock of SNCF is owned by the French Republic.

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STATUTE INVOLVED

Foreign Sovereign Immunities Act of 1976
U.S. Code, Title 28
(Excerpts)

§ 1602. Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

§ 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

. . .

STATEMENT

This is the second time the present controversy is before this Court. When the case came before the Court for the first time on petition of the present Respondent, the Court held up the petition pending decision in *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (June 7, 2004). Following the decision in *Altmann*, the Court granted the petition, vacated the judgment of the Court of Appeals for the Second Circuit, and remanded the case for further consideration in light of the decision in *Altmann*. *Société Nationale des Chemins de Fer Français v. Abrams*, 541 U.S. __, 124 S. Ct. 2834 (June 14, 2004).

Following briefing by both sides, as well as by the U.S. government, the Court of Appeals held that it was bound by the Court's decision in *Altmann* and directed the District Court to dismiss the case for lack of subject matter jurisdiction. *Abrams v. Société Nationale des Chemins de Fer Français*, 389 F.3d 61 (2d Cir. Nov. 9, 2004). The present petition is based on the assertion that the Court of Appeals misunderstood this Court's decision in *Altmann* and the remand order in this case. There is no reason to believe that the Court of Appeals misunderstood, and no justification for this Court to take up the case again.

SUMMARY OF ARGUMENT

1. The Court of Appeals correctly followed this Court's instruction, based on the clear holding that the immunity of a foreign sovereign under the Foreign Sovereign Immunities Act is determined as of the filing of the action, regardless of the date of the conduct on which the action is based. There is no dispute that Defendant SNCF was entitled to immunity

as of the date the action was filed, and there is no basis for distinguishing for this purpose between the state itself and a corporation directly owned by the state.

2. Petitioners' attempt to invoke this Court's analysis in *Landgraf v. USI Film Products* to revive their action is directly contrary to this Court's judgment in *Altmann*.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY APPLIED THE *ALTMANN* DECISION TO THIS CASE.

A. This Court's Decision Left No Room for Misunderstanding

In *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), plaintiffs sought to bring a claim for expropriation for which immunity would not be granted under the Foreign Sovereign Immunities Act of 1976. Their claim was based on conduct by the government of Austria in the 1940s, when immunity from suit would have been in effect. In response to the plea by Austria that permitting the action to go forward would be "impermissibly retroactive," Justice Stevens, writing for the Court, pointed first to the preamble of the Act:

> "Claims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602 (emphasis by the Court).

541 U.S. at ___, 124 S. Ct. at 2252.

While this passage might not be an express command, the Court's opinion continues, "this language is unambiguous: Immunity 'claims' – not actions protected by immunity, but assertions of immunity to suits arising from those actions – are the relevant conduct regulated by the Act; those claims are 'henceforth' to be decided by the courts." 124 S Ct. at 2252-53. Further, the judgment accepts the District Court's suggestion that "Congress intended courts to resolve *all* such claims 'in conformity with the principles set forth' in the Act regardless of when the underlying conduct occurred." 541 U.S. at __, 124 S. Ct. at 2253.

Abrams v. Société Nationale presents the reverse fact pattern from *Altmann v. Austria*, where it was defendants that sought to avoid the FSIA, because the exception to immunity for claims of expropriation was not adopted until passage of the Act. 28 U.S.C. § 1605(a)(3). In the present case, it is plaintiffs who seek to avoid the FSIA, based on their contention (which Respondent rejects[1]) that prior to the passage of the Act Defendant SNCF would not have been entitled to immunity, whereas under the Act there is no doubt that Defendant SNCF is immune. But there is nothing in the Court's opinion in *Altmann* that could lead anyone to conclude that application of the FSIA "regardless of when the underlying conduct occurred" pertains only to instances where the legislation limits immunity, thereby expanding jurisdiction, and not when the legislation confirms or expands immunity, thereby restricting jurisdiction.

In response to the invitation of the Court of Appeals when considering the remand, the State and Justice Departments filed a letter brief setting forth their view that after *Altmann*

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1. *See* pp. 14-15, *infra*.

the FSIA applied whether it broadened or narrowed the immunity that a foreign state or instrumentality had had prior to passage of the Act:

> The Court's analysis in *Altmann* does not admit of a distinction between instances in which the FSIA offers a *narrower* immunity than foreign states historically enjoyed and those cases in which the current foreign policy confers a *broader* immunity for foreign states. The FSIA, the Supreme Court held in *Altmann*, represents the political branches' current determination that certain classes of suits present sufficient risk of interfering with the country's international relations that they should not be heard in the United States' courts. Nothing in *Altmann* suggests that only Congress's determination that certain cases *can* proceed should be given immediate effect, or that a court is free to set aside Congress's conclusion that other suits should *not* be heard based on the court's own view that the Executive Branch would historically have allowed those suits to go forward. Indeed, if anything, courts should be more deferential to the FSIA's provisions reflecting a determination that certain cases should *not* proceed. Ignoring that policy judgment risks disrupting our relations with foreign states in a manner the political branches have sought to avoid.[2]

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2. Letter Brief dated August 10, 2004 from Appellate Staff, Civil Decision, U.S. Department of Justice and Office of Legal Adviser, U.S. Department of State, at p. 4. The complete letter is reproduced as an Appendix to this Brief in Opposition.

Petitioners seek to avoid this Court's holding in *Altmann* by contending that the opinion did not reach government-owned corporations. The Court's opinion in *Altmann* expressly rejects the thrust of that contention – that some provisions of the FSIA could be applied in a given case, others not, pointing out that the Act's overall structure "strongly supports" the conclusion that all claims against foreign sovereigns, as defined, are to be resolved in conformity with the principles set forth in the Act:

> Many of the Act's provisions unquestionably apply to cases arising out of conduct that occurred before 1976. In *Dole Food Co. v. Patrickson*, 538 U.S. 468, 123 S. Ct. 1655, 155 L.Ed.2d 643 (2003), for example, we held that whether an entity qualifies as an "instrumentality" of a "foreign state" for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred. In addition, *Verlinden* [*B.V. v. Central Bank of Nigeria*, 461 U.S. 480], which upheld against constitutional challenge 28 U.S.C. § 1330's grant of subject-matter jurisdiction, involved a dispute over a contract that predated the Act.... And there has never been any doubt that the Act's procedural provisions relating to venue, removal, execution, and attachment apply to all pending cases. Thus, the FSIA's preamble indicates that it applies "henceforth," and its body includes numerous provisions that unquestionably apply to claims based on pre-1976 conduct. In this context, it would be anomalous to presume that an isolated provision (such as the expropriation exception on

> which respondent relies) is of purely prospective application absent any statutory language to that effect.

541 U.S. at ___, 124 S. Ct. at 2253.

The State/Justice brief unequivocally supports Respondent's position that the FSIA applies to all actions filed following passage of the Act:

> *Altmann* itself makes clear that the FSIA's definition of foreign states to encompass agencies and instrumentalities of those states is, like the rest of the Act, to be applied to all post-enactment cases. Indeed, *Altmann*'s analysis of the retroactivity issue of the FSIA relied in significant respect on the Court's understanding of its holding the prior year in *Dole Food*, which focused on the agency or instrumentality provision. As the Court explained in *Altmann*, *Dole Food* "held that whether an entity qualifies as an 'instrumentality' of a foreign state for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Altmann*, 124 S. Ct. at 2253. The scope Congress gave to the definition of a "foreign state" to include an "agency or instrumentality" is, as much as the other immunity provisions of the FSIA, a foreign policy judgment as to the extent of "comity" we should extend to foreign states.[3]

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3. State/Justice Letter Brief, note 2 *supra*, p. 5. *See also Argentine Republic v. Amerada Hess Shipping Corporation*, 488 U.S. 428, 437-38 (1989).

In short, any attempt to distinguish *Abrams* from *Altmann* – either on the basis that one case involved opening and the other involved closing the door to U.S. courts, or on the basis that one case involved the state itself and the other a state instrumentality – must fail, as the Court of Appeals clearly understood.

B. The Court of Appeals Correctly Applied the Judgment in *Altmann* to the Present Case.

On remand from this Court, the Court of Appeals acknowledged that the inquiry it had initiated when the case first came before it was no longer necessary or appropriate, because the purpose of sovereign immunity, as this Court had held, is not to help shape foreign states' future conduct but to "reflect . . . current political realities and relationships." 369 F.3d at 63, quoting from 541 U.S. at ___, 124 S. Ct. at 2252.

As to plaintiffs' argument that this Court's holding in *Altmann* should not bind the court in *Abrams* because SNCF was a corporate entity and not a state at the time of the alleged conduct, the Court of Appeals correctly said that this fact is immaterial after *Altmann*, 389 F.3d at 64.[4] Though the Court of Appeals was clearly unhappy with the instructions from this Court, it made no mistake in applying them. The District Court had dismissed the action on the basis of sovereign immunity,

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4. The Court of Appeals apparently believed that SNCF was a non-governmental entity at the time of the alleged misconduct. This statement is not correct. *See* the District Court's opinion, 173 F. Supp. 2d 423 at 425-26. However, the Court of Appeals was correct in stating that this allegation is immaterial. As the court said, "Once the railroad is encompassed by the FSIA, its prior incarnation as a private entity does not bar the statute's retroactive application." *Id.*

and the reversal and remand of that judgment by the Court of Appeals had been reversed by this Court. Accordingly, the Court of Appeals recalled its mandate to the District Court and affirmed that court's dismissal of the action.

The judgment of the Court of Appeals leaves no room, and supplies no reason, for this Court to revisit the case.

II. THERE IS NO SUPPORT FOR PETITIONERS' ATTEMPT TO INVOKE THE *LANDGRAF* PRESUMPTION AGAINST RETROACTIVITY TO REVIVE THEIR CLAIM.

Faced with the clear statement in *Altmann* that the presumption against retroactivity "is just that – a presumption", 541 U.S. at ___, 124 S. Ct at 2250, and that the rationales supporting the presumption do not fit the considerations governing foreign sovereign immunity, *id.* at ___, 124 S. Ct. at 2252, Petitioners seek to distinguish the present case by contending that the Court in *Altmann* focused only on defendant's expectations, not on those of the plaintiffs.

In fact, this Court distinguished between reliance by parties on settled rules in shaping their primary conduct, as in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), and the considerations governing the grant of sovereign immunity, both before and after passage of the Foreign Sovereign Immunities Act. As the Court wrote, sovereign immunity "reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* protection from the inconvenience of suit as a gesture of comity." 124 S. Ct. at 2252, quoting from *Dole Food Co. v. Patrickson*, 538 U.S. 468 at 479 (2003). Accordingly, it was

more appropriate, absent contraindications, to defer to the decisions of the political branches – namely, the policy reflected in the FSIA – "than to presume that decision inapplicable merely because it postdates the conduct in question." *Id.* In other words, foreign sovereign immunity is not about expectations at all, but about a judgment, made by Congress since 1976, concerning what entities qualify as foreign sovereigns and what claims against foreign sovereigns may be heard in United States courts.

The Second Circuit, which in its earlier decision had relied on *Landgraf* to remand the case to the District Court, *Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173 at 180-86 (2003), understood clearly that it had been reversed precisely on this issue. Quoting the passages quoted above, the Court of Appeals wrote:

> . . . the [Supreme] Court concluded that the retroactivity analysis established in *Landgraf* . . . , and upon which this panel had relied, was inappropriate. Further, the Supreme Court stated that the Act's preamble, as well as its overarching thematic structure, indicated Congress' design for the Act to apply retroactively.
>
> . . .
>
> Appellants [Petitioners here] misapprehend the *Altmann* holding by stating that it "turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit.". . . The Supreme Court stated, to the contrary, that reliance interests are inapplicable in assessing the retroactivity of sovereign immunity principles because immunity

> simply "reflects current political realities and relationships."

389 F.3d at 63, 64.

There is, of course, one difference between *Altmann* and the present case: In *Altmann*, the post-conduct legislation created jurisdiction where there was none before, while in the present case the post-conduct legislation bars jurisdiction where (at least arguably) jurisdiction existed previously. In this connection, it is worth noting that even the dissenters in *Altmann*, who would have applied the presumption against retroactivity in that case, made clear that a statute that operated to *foreclose* jurisdiction of a lawsuit (including where it in fact stripped previously existing jurisdiction from the courts) could be applied "without fear of working any retroactive effect." 124 S. Ct. at 2267 (Kennedy, J. dissenting). Thus, it is clear that all nine Justices of this Court agreed that nothing in the *Landgraf* doctrine would preclude recognition of immunity under the FSIA for an entity such as SNCF, regardless of the date of the conduct on which the claims were based.

There is no reason to revisit the relationship of the *Landgraf* doctrine to the FSIA, and no reason to disturb the correct disposition of this case by the Court of Appeals in accordance with this Court's instructions.

III. PETITIONERS' ALLEGATION THAT THEIR REASONABLE EXPECTATIONS ARE FRUSTRATED BY "RETROACTIVE IMMUNIZATION" OF RESPONDENT IS BASED ON A SERIES OF ERRONEOUS ASSERTIONS.

1. The assertion that plaintiffs in the 1940s had the expectation of being able to sue a corporation owned by the government of France in a United States court is inherently incredible. Indeed, the fact is that not until well after passage of the FSIA did some courts in the United States consider that they had jurisdiction over the kind of claim attempted in this case. Compare *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) with *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). *See also Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, esp. 2761-66 (2004).

2. The assertion (Petition p. 5) that discovery in this case "clearly indicated" that SNCF had no immunity prior to enactment of the FSIA is false. No such outcome appeared in the discovery process, which was halted by the Magistrate Judge following this Court's decision in *Altmann.*[5]

5. The Court of Appeals directed the District Court to develop a record on which the Court could base a determination whether plaintiffs legitimately could have expected to litigate their claims in the United States, 332 F.3d at 187-88. On remand, the District Court wrote to the State Department to see if it could provide any information relevant to this factual inquiry. Eventually, a reply from an attorney at the Civil Division of the Justice Department "respectfully declined" the invitation to participate in the inquiry, at least until the Supreme Court decided the *Altmann* case and acted on the petition for certiorari filed by the present Respondent and then pending. Other aspects of discovery probed SNCF's charters and personnel at different times, but no evidence emerged to establish that a claim for immunity by SNCF would have been denied prior to passage of the Act.

3. Petitioners' entire case depends on the assertion that the Foreign Sovereign Immunities Act of 1976 closed a door to their claims that had previously been open. That assertion runs up against the well-known fact that until 1952 the United States followed the doctrine of absolute immunity for foreign states, *i.e.*, the doctrine that made no distinction between claims arising out of commercial activity and claims arising out of government activity. *See*, for a concise summary, *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 at 486-88 (1983). Notwithstanding some resistance in lower U.S. courts and abandonment of the absolute theory of immunity in many other countries (but not the United Kingdom and states following the British model), this Court several times reaffirmed the doctrine in controversies arising out of commercial activities conducted by ships or other government-owned entities. *See Berizzi Brothers Co. v. The Pesaro*, 271 U.S. 562 (1926); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (dictum); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943).

The Court of Appeals in the present case acknowledged this fact, and also understood that courts in the United States uniformly granted immunity whenever the State Department made a suggestion to that effect. 332 F.3d at 176, 187. There were a few instances in which the State Department did not "recognize and allow" a claim of immunity, typically when there was doubt about the ownership or possession of a vessel for which immunity was claimed. *See*, *e.g.*, *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). The most that could have been said about the immunity of a state-owned corporation prior to 1952 was that one could not always be sure what position the State Department would take.

It was the possibility that the State Department might not have "recognized and allowed" a claim of immunity that led the Court of Appeals in the present case to vacate the decision of the District Court and order discovery concerning the State Department's view at the relevant time, an inquiry subsequently rejected in *Altmann*, 124 S. Ct. at 2254. There certainly could have been no settled expectations on the part of Petitioners that they could have obtained jurisdiction over SNCF on the present claims in United States courts, and to speak of "retroactive immunization" (Petition p. 14) is well wide of the mark.

CONCLUSION

The petition presents no open issue calling for Supreme Court resolution, and no error by the Court of Appeals that calls for correction by this Court. The petition should be denied.

Respectfully submitted,

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APPENDIX — LETTER FROM STATE AND JUSTICE DEPARTMENT TO COURT OF APPEALS DATED AUGUST 10, 2004

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August 10, 2004

Roseann B. MacKechnie, Clerk of Court
Second Circuit Court of Appeals
United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Abrams v. Societe Nationale des Chemins de Fer Francais*, No. 01-9442 (2d Cir.)

Dear Ms. MacKechnie:

Amicus curiae the United States of America respectfully submits this letter brief in response to the request of the Court (Cardamone, Miner, Sotomayor, JJ.) dated June 28, 2004, for supplemental briefing with respect to the Supreme Court's recent decision in *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

Appendix

There is no question that the transportation of French Jews and others to their deaths in Nazi concentrations camps during the Holocaust was an outrageous act of inhumanity that the United States condemns in the strongest possible terms. The question presented here, however, is a distinct and far narrower one: whether the Court's jurisdiction over plaintiffs' claims arising out of that conduct is to be determined according to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602 *et seq.*, enacted in 1976, or by the Court's assessment of the Executive Branch's historical practice regarding suits against foreign states and their instrumentalities at the time of the Holocaust. In *Altmann*, the Supreme Court held that the FSIA is a comprehensive statute governing suits against foreign sovereigns and their instrumentalities and should be applied in all cases filed after its enactment. We see no distinction that would lead to a different rule in this case. Therefore, we believe that the FSIA must be applied here.

Background

Plaintiffs brought suit against the French national railway (SNCF) for claims arising out of the railway's alleged role in transporting French Jews to Nazi death camps during the German occupation of France in World War II. At the time plaintiffs filed their complaint, "SNCF was an agency or instrumentality of France." *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 180 (2d Cir. 2003). To the extent the FSIA applies to this case, therefore, SNCF is entitled to immunity on generally the same terms as France itself. *Id.* at 179 (citing 28 U.S.C. § 1603(a)).

Appendix

Plaintiffs contend that the FSIA does not apply to their suit because their claims arose at a time when the doctrine of foreign sovereign immunity did not extend to foreign state instrumentalities, and, they maintain, the FSIA cannot be applied retroactively to deprive the courts of jurisdiction they would have had at the time the claims arose. This Court, in an earlier opinion in this case, agreed with plaintiffs. Applying the presumption against retroactive legislation articulated in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Hughes Aircraft Co. v. United States*, 520 U.S. 939 (1997), the Court held that, to the extent the FSIA changed the courts' jurisdiction with respect to foreign states and their instrumentalities, it did not apply to claims arising before the statute's enactment. *Abrams*, 332 F.3d at 181-83. SNCF sought certiorari to the Supreme Court, which held the petition pending a decision in *Altmann*.

The *Altmann* case also arose out of World War II-era conduct -- Austria's alleged refusal to return artworks taken by the Nazis from plaintiff's uncle. Altmann sued Austria, invoking the court's jurisdiction pursuant to the FSIA's immunity exception for claims concerning the taking of property in violation of international law, 28 U.S.C. § 1605(a)(3). There was no such exception to the general rule of foreign state immunity at the time of World War II. *See, e.g., Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964) (even under restrictive theory of immunity, foreign states were immune from suit challenging "internal administrative acts" and "legislative acts, such as nationalization"). Austria (supported by the United States) argued that the FSIA's expropriation exception could not be applied retroactively to Altmann's pre-FSIA claim because doing

so would constitute a retroactive expansion of the courts' jurisdiction under *Landgraf* and *Hughes*.

In its opinion in *Altmann*, the Supreme Court held that Congress's enactment of a new rule of foreign state immunity in the FSIA was not subject to *Landgraf*'s and *Hughes*'s presumption of non-retroactivity, and that the Act reflected Congress's intent that the courts apply it to all suits filed after its enactment, even when the claims concerned pre-enactment conduct. The Court explained that "[t]hroughout history, courts have resolved questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction.'" 124 S. Ct. at 2252. "In this *sui generis* context," the Court continued, "we think it more appropriate, absent contradictions, to defer to the most recent such decision -- namely, the FSIA -- than to presume that decision *inapplicable* merely because it postdates the conduct in question." *Ibid.* Unencumbered by the presumption against retroactivity, the Court found "clear evidence" of "Congress' understanding that the Act would apply to all postenactment claims of sovereign immunity." *Ibid.* The Court noted that the FSIA's preamble stated that "[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States in conformity with the principles set forth in this chapter," *ibid.* (quoting, with emphasis, 28 U.S.C. § 1602), and found that this language "unambiguous[ly]" "suggests Congress intended courts to resolve all such claims 'in conformity with the principles set forth' in the Act, regardless of when the underlying conduct occurred." *Id.* at 2253. The Supreme Court then vacated this Court's decision in *Abrams* and remanded for reconsideration in light of the

Altmann opinion. *See Société Nationale des Chemins de Fer Français v. Abrams*, 124 S. Ct. 2834 (2004).

Discussion

The Supreme Court's reasoning in *Altmann* does not support an argument that the FSIA does not apply to this post-enactment suit against a foreign state instrumentality. Nor does it support an argument that the Court's analysis in *Altmann* governs only in circumstances where the foreign policy expressed by Congress in the FSIA *narrowed* foreign states' immunity, and not where Congress determined that foreign state immunity should be expanded.

A central theme of the *Altmann* opinion is that the principles governing foreign sovereign immunity are based on comity and the likely foreign affairs ramifications of such litigation, and it is the political branches' policy determination at the time the suit is brought that should control the courts' exercise of jurisdiction. "[S]uch immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* 'protection from the inconvenience of suit as a gesture of comity.'" 124 S. Ct. at 2252 (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), first emphasis added). In light of "this *sui generis* context," the Court held both that the judiciary should "resolve[] questions of foreign sovereign immunity by deferring to the 'decisions of the political branches . . . on whether to take jurisdiction,'" and that, in so doing, the courts should "defer to the most recent such decision – namely, the FSIA." *Ibid.* The Court found further support for this conclusion from the fact that the courts

and the State Department had presumed that the principles of foreign state immunity articulated in the 1952 Tate Letter would apply to post-1952 "disputes concerning conduct that predated the letter." *Id.* at 2252 n.16.

The Court's analysis in *Altmann* does not admit of a distinction between instances in which the FSIA offers a *narrower* immunity than foreign states historically enjoyed and those cases in which the current foreign policy confers a *broader* immunity for foreign states. The FSIA, the Supreme Court held in *Altmann*, represents the political branches' current determination that certain classes of suits present sufficient risk of interfering with the country's international relations that they should not be heard in the United States' courts. Nothing in *Altmann* suggests that only Congress's determination that certain cases *can* proceed should be given immediate effect, or that a court is free to set aside Congress's conclusion that other suits should *not* be heard based on the court's own view that the Executive Branch would historically have allowed those suits to go forward. Indeed, if anything, courts should be more deferential to the FSIA's provisions reflecting a determination that certain cases should *not* proceed. Ignoring that policy judgment risks disrupting our relations with foreign states in a manner the political branches have sought to avoid.

The FSIA reflects Congress's present policy judgment that a foreign state's agencies and instrumentalities should be accorded immunity on essentially the same terms as the foreign state. Thus, when Congress provided that "a foreign state shall be immune from the jurisdiction of the courts of

the United States and of the States except as provided" in the FSIA's exceptions, 28 U.S.C. § 1604, it expressly defined the term "foreign state" so as to extend this immunity to any "political subdivision of a foreign state or an agency or instrumentality of a foreign state," *id.* § 1603(a). In other words, Congress's *current* judgment is that claims against foreign state instrumentalities for torts occurring outside the United States should not be heard in U.S. courts. If the same conduct were to occur today, there is no dispute that claims arising out of the conduct would be barred by the FSIA. *Altmann* leaves no doubt that it is this *present* determination that governs courts' immunity inquiry. 124 S. Ct. at 2252 ("we think it more appropriate * * * to defer to the most recent such decision [regarding the scope of immunity] -- namely, the FSIA -- than to presume that decision inapplicable merely because it postdates the conduct in question").

Altmann itself makes clear that the FSIA's definition of foreign states to encompass agencies and instrumentalities of those states is, like the rest of the Act, to be applied to all post-enactment cases. Indeed, *Altmann*'s analysis of the retroactivity issue of the FSIA relied in significant respect on the Court's understanding of its holding the prior year in *Dole* Food, which focused on the agency or instrumentality provision. As the Court explained in *Altmann*, *Dole Food* "held that whether an entity qualifies as an 'instrumentality' of a `foreign state' for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Altmann*, 124 S. Ct. at 2253. The scope Congress gave to the definition of a "foreign state" to include an "agency or instrumentality" is, as much as the other immunity

provisions of the FSIA, a foreign policy judgment as to the extent of "comity" we should extend to foreign states.

We cannot agree with plaintiffs' contention that *Altmann* does not apply because the pre-FSIA practice of denying immunity to foreign state instrumentalities was assertedly more firmly entrenched than the practice, at issue in *Altmann*, of granting immunity from expropriation claims. Under plaintiff's theory, *Altmann* was simply a narrow determination by the Supreme Court that foreign states did not have a sufficiently settled expectation of immunity from expropriations claims, which does not preclude them from seeking to establish that the historical practice of not extending immunity to foreign state instrumentalities was sufficiently settled to warrant a different result under *Landgraf*. Again, this argument is foreclosed by *Altmann*'s analysis. The Supreme Court did not base its decision on a review of the historical record regarding foreign states' expectations whether they would be immune from expropriation claims of the type alleged in *Altmann*. The Court cited no case prior to the FSIA in which an expropriation claim had been heard in U.S. courts without a waiver of immunity by the defendant. *Cf. Victory Transport Inc.*, *supra* (indicating that foreign states were immune from such claims). To the contrary, the Court specifically criticized the Ninth Circuit's attempt to analyze the Executive Branch's historical immunity practice as "precisely the kind of detailed historical inquiry that the FSIA's clear guidelines were intended to obviate." *Altmann*, 124 S. Ct. at 2254. Thus, the allegation that sovereign instrumentalities such as SNCF could be sued is no more a basis for refusing to apply the FSIA in this post-enactment case than was the consistent historical

practice of not hearing expropriation claims a basis for denying the FSIA application in *Altmann*. Indeed, the Court specifically precluded such an argument by clarifying that, under its holding, the FSIA "applies to conduct * * * that occurred * * * prior to 1952 when the State Department adopted the restrictive theory of sovereign immunity," *i.e.*, to the period when the Executive Branch and courts granted foreign states absolute immunity. 124 S. Ct. at 2254.

What the Court did emphasize in *Altmann* about the history of foreign sovereign immunity was that, prior to the FSIA, the Executive Branch's determination as to whether there was immunity in cases against "foreign sovereigns *and their instrumentalities*" was binding on the courts. 124 S. Ct. at 2248 (emphasis added). Thus, while "foreign states had a justifiable expectation that, as a matter of comity, United States courts would grant them immunity for their public acts ... they had no 'right' to such immunity." *Id.* at 2251. Similarly, while plaintiffs in certain types of cases might have had a justifiable expectation that their suit against a foreign state or its instrumentalities would be allowed to go forward, they had no right to insist that their suit be permitted. In fact, the Supreme Court recounted that, due to foreign relations considerations, the State Department had sometimes filed "suggestions of immunity in cases where immunity would not have been available" under the stated guidelines for immunity determinations. *Id.* at 2249 (quoting *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983)). The only characteristic of the historical practice of foreign state immunity that the Court found relevant in *Altmann* -- its uncertainty -- defeats plaintiffs' claim of "right."

Finally, but importantly, *Altmann* reaffirms that the FSIA is a "comprehensive jurisdictional scheme" that is the "'sole basis for obtaining jurisdiction over a foreign state in our courts'" after its enactment. 124 S. Ct. at 2253-54 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989)). Congress has expressly amended 28 U.S.C. § 1332 and impliedly amended 28 U.S.C. §§ 1331 and 1350 to preclude reliance on them as a basis for asserting jurisdiction over foreign states, including foreign state instrumentalities. *See Amerada Hess*, 488 U.S. at 437-38 & n.5. Thus, under *Altmann*, plaintiffs cannot rely on these general jurisdictional grants as a basis for maintaining this suit against an instrumentality of the French state.

Under plaintiffs' theory, these jurisdiction-stripping aspects of the FSIA would be subject to the presumption of nonretroactivity while the jurisdiction-creating aspects of the Act would be immediately applicable. That construction would turn Supreme Court precedent on its head. While the Court has expressly held that a statute that "creates jurisdiction where none previously existed" - such as by "eliminat[ing] a defense" is one that affects "substantive rights" and is subject to the presumption of non-retroactivity, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948, 950-51 (1997), longstanding precedent establishes that statutes "ousting jurisdiction" ordinarily become immediately applicable to pending cases "whether or not jurisdiction lay when the underlying conduct occurred *or when suit was filed*," *Landgraf*, 511 U.S. at 273 (emphasis added). *See also Bruner v. United States*, 343 U.S. 112, 116-17 (1952) ("when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"; this rule "has been adhered to consistently by this

Court"); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (ousting provision "made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States").

The rule that jurisdiction-stripping enactments must be given immediate effect follows from the principle that the courts have only that "[j]urisdiction * * * conferred by an act of Congress, and when that act of Congress [is] repealed the power to exercise such jurisdiction is withdrawn." *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869). Without a jurisdiction-conferring statute, "the court cannot proceed at all." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). And, in *LaFontant v. INS*, 135 F.3d 158, 161-63 (D.C. Cir. 1998), the D.C. Circuit explained at length that the rule of Hallowell and Bruner giving immediate effect to jurisdiction-ousting statutes remains good law following *Hughes*. *See also Lindh v. Murphy*, 521 U.S. 320, 342-43 & n.3 (1997) (Rehnquist, C.J., dissenting) ("nothing in *Hughes* disparaged our longstanding practice of applying jurisdiction-*ousting* statutes to pending cases" (citing *Hallowell* and *Bruner*)). Thus; jurisdiction-ousting changes are not subject to a stronger presumption of nonretroactivity than jurisdiction-creating changes.

Conclusion

For the foregoing reasons, the Court should apply the principles of the FSIA, including the statutory definition of "foreign state" to include an "agency or instrumentality," in

determining the Court's jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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Petitioners,

v.

SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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PARTIES TO THE PROCEEDINGS

The parties to the proceeding were set forth at page ii of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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INTRODUCTION

The holding of the Second Circuit that this case is precluded by *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), is inconsistent with the reasoning of this Court in *Altmann*. In that decision, this Court held that the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, may be applied retroactively to sovereign governments in so far as it makes available a United States forum for legal action against a foreign sovereign for expropriation of property. That holding turns upon the fact that the foreign government enjoyed no settled expectation in avoiding suit in a particular forum through a defense of sovereign immunity. This Court stressed the "narrowness" of its decision in *Altmann,* 124 S. Ct. at 2254. *Altmann* does not bar this lawsuit against a separate corporate entity for war crimes for which plaintiffs have no other forum. The ruling in *Altmann* reached only the question of expanding the available fora for a cause of action, not the closing of the only available forum for a pre-existing cause of action.

The position of the Second Circuit, in rejecting any review of the settled rights of plaintiffs, is in direct opposition to that of the Third and Ninth Circuits, which do consider such rights in any analysis of the retroactive reach of a statute. Review by this Court is warranted to resolve this conflict.

By granting the Petition for Certiorari, this Court will provide a uniform determination of retroactivity in cases involving settled expectations of plaintiffs, without disturbing the holding in *Altmann*, which addressed only the expectations of sovereign states. This Court should also grant certiorari to clarify whether, or the extent to which, "jurisdiction-ousting" statutes are subject to the retroactivity analysis set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

ARGUMENT

I. The Second Circuit and the Respondent Have Misconstrued the Reasoning of *Altmann*.

SNCF in its opposition to the Petition ignores the first four sections of *Altmann*, especially Section IV, in which this Court sets forth its reasoning supporting the retroactivity analysis expounded in *Landgraf*. In that Section, which deals specifically with the vitality of *Landgraf*, this Court goes to great lengths to explain why *Landgraf* does not provide a resolution in *Altmann*. The Court's finding is that sovereign states had no settled expectations of immunity and, therefore, an analysis framed in terms of settled rights, the foundation of the retroactivity analysis set forth in *Landgraf*, did not provide an answer in that case. *See Altmann*, 124 S. Ct. at 2251.

SNCF argues that, should the Court in this case apply *Landgraf*, it would find that the FSIA had no retroactive effect because (a) the FSIA did not alter the immunity of SNCF and (b) the presumption against retroactive effect does not apply when a claim is eliminated by statute, as opposed to a claim thereby being created. The former is simply wrong, as is shown in the Petition for Certiorari. *See* Pet. at 8-9, *see also infra* at Point II. The latter SNCF couches in terms of the proposition, often debated before this Court, that the retroactive effect of a statute should be ignored if the statute is "jurisdiction-ousting" rather than "jurisdiction-granting." Opp. at 12. Yet SNCF is unable to cite any case that held that jurisdiction-ousting statutes that closed all possible legal recourse in all fora were not impermissibly retroactive. Petitioners are unaware of any case in which this Court ever held that a "jurisdiction-ousting statute" that closed all possibility of any legal redress was not impermissibly retroactive. Cases cited by Petitioners such as *Mathews v. Kidder Peabody & Co.*, 161 F.3d 156 (3d Cir. 1998), and *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000), specifically found that a statute that eliminated an existing cause of action was impermissibly retroactive.

SNCF begins its opposition to the Petition by citing this Court's analysis of the "henceforth" clause of the FSIA preamble. Opp. at 4-5. Such analysis was not, as SNCF implies, the beginning of this Court's reasoning nor its sole analytical tool. It was only after the Court determined that the *Landgraf* analysis did not conclusively support the anti-

retroactivity presumption that the Court looked at the language of the statute.

The Court conceded that the text of the FSIA "falls short of an 'express prescription of the statute's proper reach.'" *Altmann,* 124 S. Ct. at 2251 (citation omitted). Had it found otherwise, the preceding portion of the decision analyzing the expectations of sovereign states under a *Landgraf* analysis would have been unnecessary. Instead, the Court recognized the presumption against retroactivity, found that an analysis of reliance interests of sovereign states was not dispositive, and then looked at the language of the statute to see if there was anything to overcome the presumption. *See id.* at 2250-54. In this case, an appropriate analysis of reliance interests would allow this action to go forward.

Respondent's presumption that "all nine Justices of this Court agreed [in *Altmann*] that nothing in the *Landgraf* doctrine would preclude recognition of immunity under the FSIA for an entity such as SNCF," Opp. at 12, is baseless. This Court in *Altmann* found only that *Landgraf* did not provide an answer where the expectations of a sovereign state were at issue. The analysis in *Altmann* has no applicability to a case in which a separate corporation such as SNCF, which is not a sovereign state, seeks a determination that sovereign immunity should be accorded to it for its conduct prior to 1976.

SNCF treats lightly the presumption against retroactivity. Opp. at 10. However, such a presumption is "a principle in the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect.'" *Altmann*, 124 S. Ct. at 2264 (Kennedy, J. dissenting) (citing *Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. 1811)). It is a presumption with legal and historical foundations and to which this Court has appended specific rules to guide its application. This Court did not dismiss the presumption against retroactivity. Any analysis of the retroactivity of the FSIA requires an analysis of the reliance interests of the parties. In *Altmann*, this Court concluded that such an analysis was not determinative. In this case, it is.

II. Petitioners Have Always Had the Right to Legal Redress Against SNCF.

Prior to the FSIA, SNCF was amenable to suit in the United States. Although SNCF argues that it would have been entitled to immunity, Opp. at 5, such a position ignores the facts and the law. SNCF was repeatedly sued in United States courts prior to the enactment of the FSIA, *see* Pet. at 8 n.7, and until this case, never raised the affirmative defense of sovereign immunity. As in this case, plaintiffs in those cases sought redress in the United States for injuries sustained by SNCF's commercial activities in France.

SNCF attempts to dismiss these facts and its own litigation history as "inherently incredible." Opp. at 13. SNCF would have this Court assume that it chose not to assert an available defense such as sovereign immunity, but instead willingly litigated suit after suit – with the attendant legal fees and awards. Such a position is also inherently incredible.

Discovery furnished by SNCF established that neither the government of France nor SNCF ever invoked the defense of sovereign immunity in any of the cases in which SNCF was sued in United States courts before enactment of the FSIA. SNCF has confirmed that it has no documentation reflecting any communications with the State Department by SNCF, the government of France or any other person, government or entity on the subject of sovereign immunity. Thus, any assertion by SNCF that it would have been entitled to immunity prior to 1976 is rank speculation.

SNCF's attempt to cloak itself with the mantle of absolute immunity is equally flawed. SNCF's "well-known fact" regarding the applicability of absolute immunity, Opp. at 5, is not a fact at all. The doctrine was available only to sovereigns themselves, not to separate corporate entities whose shares happened to be owned by a government. *See e.g. United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d 199, 202 (S.D.N.Y. 1929); *Coale v. Société Co-operative Suisse des Charbons*, 21 F.2d 180, 181 (S.D.N.Y. 1921). SNCF

also denies more than 150 years of American jurisprudence regarding the lack of immunity for separate entities.[1] SNCF has been unable to cite a single case where a separate corporate entity owned by a government was granted immunity. Plaintiffs have cited numerous cases where separate corporate entities were denied immunity. *See* Pet. at 9.

Furthermore, in *Altmann*, no issue of the expectations of separate entities was before this Court. This Court reviewed only the expectations and reliance interests of a sovereign defendant, finding that expectations based on the fluid doctrine of comity did not rise to the level of settled expectations. It did not review, nor reject, an analysis of the settled expectations of plaintiffs.

The Second Circuit, however, reluctantly concluded that retroactivity that impairs plaintiffs' rights was sanctioned by this Court in *Altmann*. But such an approach, which essentially assumes that defendants' rights are of greater value than those of plaintiffs or do not even have to be considered in determining whether a statute is impermissibly retroactive, has no support in *Altmann*. Moreover, it contradicts the positions of the Third and Ninth Circuits, and merits review by this Court for that reason alone. *See* Pet. at 10.

III. The Department of State's Letter Brief to the Second Circuit Is Not Persuasive.

Although SNCF cites the letter brief from the Department of State at great length, Opp. at 5-6, Opp.

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[1] Nor do the cases cited by SNCF support its argument. For example, *Berizzi Brothers Co. v. The Pesaro,* 271 U.S. 562 (1926), concerned a vessel owned, possessed, operated and controlled directly by the Italian government. Similarly, in *Ex Parte Republic of Peru,* 318 U.S. 578 (1943), the ship was also owned directly by the Government of Peru, which submitted a formal request for immunity to the State Department. And in *Compañia Española de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68 (1938), the Navemar was a public vessel of the Republic of Spain. None of these cases involved a separate corporation engaged in commercial activities, such as SNCF.

Appendix at 1a, Petitioners submit that the Department of State's letter brief is inaccurate and misleading. Petitioners also note that the Department of State's position as an *amicus curiae* in *Altmann* was that the FSIA ought not to apply to pre-FSIA conduct, pointing out that the "FSIA is subject to established retroactivity principles," such as those set forth in *Landgraf*. *See* Brief for the United States as *Amicus Curiae* at 9, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004) (No. 03-13). Petitioners agree.

Both the Department of State and SNCF rely on the same flawed view of *Dole Food Co. v. Patrickson*, 538 US. 468 (2003). *Dole* did not consider, or hold, anything regarding the retroactive application of the FSIA or any part of it, to conduct occurring before enactment of the statute. The facts of *Dole* make it singularly ill-suited to the extraction of some sort of rule regarding the application of the FSIA to SNCF's conduct during World War II.

Furthermore, the Department of State is incorrect when it states that *Altmann* requires that separate entities be lumped with sovereign states because that is Congress's "current judgment" (Opp. Appendix at 7a). Such a statement does not address the issue of whether Congress intended that the FSIA apply retroactively to separate entities to create immunity that did not exist prior to the passage of the FSIA. In the *sui generis* context of *Altmann*, 124 S. Ct. at 2252, this Court did not address the retroactivity of the FSIA to separate entities, and the law applicable to separate entities does not lead to the conclusion that the FSIA should apply retroactively to claims against such entities for their pre-FSIA conduct.

CONCLUSION

The Second Circuit did not properly apply the holding of *Altmann* to the case at bar. This Court in *Altmann* found only that *Landgraf* did not provide an answer where the expectations of a sovereign state were at issue. The reason for this is that sovereign states, unlike private parties such as corporations engaged in commercially activity, had no settled expectation of

sovereign immunity because that doctrine was subject to continued change based on contemporary political realities. Nor did *Altmann* analyze the effect of extinguishing all claims of plaintiffs against a separate corporate entity whose shares are owned by a foreign government. In short, the analysis in *Altmann* does not control where a separate corporation such as SNCF, which is not a sovereign state, seeks a determination that sovereign immunity should be accorded to it for its actionable conduct prior to 1976.

Although SNCF contends that there is no basis for distinguishing between corporations and governments, Opp. at 7, almost 200 years of judicial history invalidates such an argument. Separate entities were always considered private parties, and plaintiffs always had the right to sue them in United States courts. In *McGrath v. Manufacturers Trust Co.*, 338 U.S. 241, 250 n.12 (1949), this Court itself recognized such a distinction, pointing out the differences "between the liabilities of foreign public or semipublic corporations and those of the foreign government to which they are related."

The FSIA was not a retroactive immunization of separate entities for their acts committed before 1976, and nothing in *Altmann* requires such a reading. *Altmann* itself leaves open an inquiry into the expectations of both plaintiffs and defendants in cases not involving sovereign governments themselves, and *Dole* deals with the status of governmental instrumentalities, not the retroactivity of their challenged behavior to a time pre-dating the statute. Nothing about the FSIA, neither text, intention nor common sense, leads to the conclusion that Congress intended to allow newly-defined instrumentalities to escape the consequences of their actions.

There is nothing in *Altmann* that requires the settled expectations of plaintiffs to be disregarded. Due process and elementary considerations of fairness mandate that the rights of plaintiffs be considered as well as those of defendants in considering the retrospective reach of a statute. Nothing in *Altmann* requires otherwise. Thus, SNCF is not entitled to the retroactive protection of the FSIA, and United States courts

should hear this case against SNCF for its commission of war crimes during World War II.

For the reasons set forth in the Petition for Certiorari and in this reply, Petitioners respectfully request that review by this Court be granted.

Respectfully submitted,

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